

## CHAPTER 7

### THE ANCESTRAL LANDSCAPE: THE NATURAL ENVIRONMENT, 1886–2006

The Rangataua estuary is the life blood of our people, ‘ngā wai koiora’ that courses through our veins: its tributaries the Waitao, Kaitimako, Omatata, Otamarua, Te Waiū and Te Awanui are the veins that supply it, and thus us with life giving nutrients – life itself . . . all living breathing features of our ancestral landscape . . .

Te Awanuiarangi Black, Ngāti Hē<sup>1</sup>

#### 7.1 INTRODUCTION

By 1840, Tauranga Moana had become one of the most continuously occupied and densely settled landscapes in New Zealand.<sup>2</sup> It is not hard to understand why. It is a place of great natural beauty, and diverse and productive ecosystems: open seas, offshore islands, coastal sandy beaches and rocky shores, the large harbour lagoon and its many estuaries, mud-flats, tidal pools, and wetlands, together with many waterways draining densely forested hills. Over generations, many hapū have been drawn to Tauranga Moana by the plentiful resources offered by these different environments – the seemingly unending supplies of fish and shellfish in Tauranga Moana itself; the eels, freshwater fish, and kōura found in the waterways draining the hills encircling the harbour; the abundance of animal and plant resources in the forests.

As hapū became entwined with this environment and its resources, they became the tangata whenua of Tauranga Moana.<sup>3</sup> The pēpeha ‘Ko Mauao te maunga, ko Tauranga te

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1. Te Awanuiarangi Black, brief of evidence, 24 May 2006 (doc Q34), p 3

2. Anne Salmond, evidence in the Planning Tribunal, [undated] (doc D1), p 3; Robert McClean, ‘Tauranga Moana Fisheries, Reclamations, and Foreshores’ (commissioned research report, Wellington: Waitangi Tribunal, 1999) (doc D7), pp 20–22

3. Document D1, p 7

moana' expresses their ongoing relationship with the natural world of Tauranga Moana, and the seamless unity of culture and nature within their ancestral landscapes.<sup>4</sup>

Previous chapters have detailed how Tauranga Māori have lost the great majority of their ancestral lands. Even so, claimants said, they have not lost their association with those many places and environments, which remain the source of their cultural identity. Indeed, very many of the claims before us related to the ways the natural environment of Tauranga Moana has been treated since its possession and control passed from the tangata whenua.

Despite having lost possession of most of these places, claimants stressed the continued significance to them of the harbour, waterways, forests, and fisheries, as well as sites such as tipuna maunga and awa, the sacred mountains and rivers of their ancestors that mark their identity. They described these aspects of the natural environment as taonga, and the source of their economic, cultural, and spiritual well-being.

The claimants argued that they never willingly alienated their taonga, and that they therefore ought to have retained rangatiratanga over them. Antoine Coffin, of Ngāti Kāhu, evoked a more general understanding among the claimants when he stated that, for the Wairoa hapū, their collective rangatiratanga comprises 'the rights of possession, use and management' of their ancestral natural resources.<sup>5</sup> The claimants also said that, in claiming whakapapa to the original inhabitants of Tauranga Moana, they inherit ongoing responsibilities as the kaitiaki, responsible for guarding and protecting these taonga for the benefit of present and future generations. Tauranga Māori affirmed to us that the authority and capacity to act as kaitiaki in the management of resources is a vitally important and practical expression of their rangatiratanga over their ancestral taonga.<sup>6</sup>

The tangata whenua of Tauranga Moana told us, however, that over the decades in which the town of Tauranga has burgeoned into a city, they have been excluded from the decisions that shaped its development, and have been unable to act as kaitiaki, and to guard and protect their taonga. It is important to stress that, in the main, the claimants before us wholeheartedly welcomed the development of Tauranga. Their concerns, rather, related to what they perceived as the unnecessary damage to their taonga that development has caused. A particular complaint was that the decision makers – the Crown and its delegates, especially local government – had failed to prevent, and had often been complicit in, the careless and even casual pollution of waterways. Desmond Tata, of Ngāi Tamarāwaho, summed up this consistently expressed sentiment when he told us:

4. Waitangi Tribunal, *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* (Wellington: Legislation Direct, 2004), p 28; counsel for Wai 540 claimants, closing submissions, undated (doc U31), p 24

5. Antoine Coffin, 'Ngāti Kāhu, Ngāti Rangi, Ngāti Pango' (commissioned research report, Wellington: Waitangi Tribunal, 1996) (doc A37(b)), p 72

6. See, for example, counsel for Wai 664 claimants, closing submissions, 12 December 2006 (doc U5)(a), p 18; counsel for Wai 100 and Wai 650 claimants, closing submissions, 29 November 2006 (doc U15), p 4; doc U31, pp 36–37; counsel for Wai 210, Wai 637, and Wai 751 claimants, closing submissions, 10 December 2006 (doc U34), p 56.

Some impact on the natural environment is inevitable when development occurs, but what I really object to is the thoughtless and irresponsible development that has taken place. Local bodies have a habit of putting rubbish dumps and oxidation ponds and sewerage plants by waterways.<sup>7</sup>

In essence, the claimants assert that the Crown has breached the Treaty by:

- ▶ failing to allow Māori to exercise rangatiratanga and kaitiakitanga over their taonga,<sup>8</sup> and;
- ▶ inadequately protecting their taonga when exercising its powers of governance. This has allowed their natural environment, resources, and iconic landmarks to be polluted, depleted, degraded, and destroyed.<sup>9</sup>

Claimants argue that these Treaty breaches continue today, because the legislation that structures the management of the natural environment and its resources still denies Tauranga Māori authority and control over their taonga. Nor does it always adequately protect their taonga.

The Crown does not accept any of these claims, and has made no concessions regarding them. The Crown maintains that it has behaved appropriately, according to the standards of the time and the options and resources available to it. It argues that the current legislation governing environmental management gives significant protection to Māori interests, and is consistent with the principles of the Treaty of Waitangi.

## 7.2 THE ISSUES

When the stage 2 inquiry began, an initial set of issues was drawn up to guide the hearing process. In light of the evidence and submissions we heard, we have now refined those issues as follows:

- ▶ What customary rights did the Treaty protect over the natural resources and the taonga of Tauranga Moana?
- ▶ Has the Crown provided for the rangatiratanga and kaitiakitanga of Tauranga Māori over their natural resources and taonga?
- ▶ Does the Crown bear any responsibility for the degradation and pollution of the natural resources and taonga of Tauranga Māori?
- ▶ Can Māori now exercise rangatiratanga and kaitiakitanga over their natural resources and taonga?

These issues provide the organising framework for this chapter.

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7. Desmond Matakokiri Tata, brief of evidence, undated (doc F20), p 19

8. Document U31, p 28

9. Ibid, pp 20–21

**7.3 NGĀ TAONGA: WHAT RIGHTS DID THE TREATY PROTECT?**

In its English version, the Treaty explicitly protected Māori possession of ‘their Lands and Estates Forests fisheries, and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same’. The Māori version protected their tino rangatiratanga over their lands, villages, and ‘o ratou taonga katoa’ – all their treasures. To understand how these Treaty protections applied in this inquiry district, we must first examine which aspects of the natural environment Tauranga Māori regarded as their ‘other properties’, or taonga.

There is no easy definition of ‘taonga’. The Tribunal observed in its *Te Whanau o Waipareira Report* that the term rests on the concept of a spiritual link between a taonga and the people, who have an obligation to protect it for the future.<sup>10</sup> In the *Ngawha Geothermal Resource Report*, the Tribunal described taonga as ‘objects of guardianship, management and control under the mana or rangatiratanga of the claimant group, hapu or iwi’, which were invested with the aura of spirituality.<sup>11</sup> The *Report on the Muriwhenua Fishing Claim* found that:

All resources were ‘taonga’, or something of value, derived from gods. In a very special way Maori were aware that their possession was on behalf of someone else in the future. Their myths and legends support a holistic view not only of creation but of time and of peoples.<sup>12</sup>

Two points to highlight from these observations are, first, the definition of taonga as something of value that also carries a spiritual dimension, and, secondly, that rangatiratanga over taonga carries the accompanying responsibility of guardianship or kaitiakitanga.

The Tribunal has also previously determined that whether specific taonga are subject to Treaty protection is context-specific. As the Tribunal for the central North Island claims observed:

Whether a resource falls into the definition of taonga protected by the Treaty turns on the evidence of a particular case. That evidence is sourced to and depends on Maori law and tenure, cultural values, and customary use.<sup>13</sup>

How and why did Māori view, use, and possess elements of Tauranga’s natural environment as taonga?

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10. Waitangi Tribunal, *Te Whanau o Waipareira Report* (Wellington: GP Publications, 1998), p 23

11. Waitangi Tribunal, *Ngawha Geothermal Resource Report* (Wellington: Brooker and Friend Ltd, 1993), p 20

12. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed (Wellington: Government Printing Office, 1989), p 179

13. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 4, p 1251



**7.3.1 The ancestral landscapes of Tauranga Moana**

As we have said, Tauranga was one of the first areas of Aotearoa New Zealand to be settled by Māori. They were greatly attracted by its mild climate, the range and concentration of available resources, and the sheltered anchorage for which Tauranga was named.<sup>14</sup> Both archaeological and traditional evidence suggest a relatively large and densely settled population of Māori persisted in the area.<sup>15</sup>

The basic structures of Māori settlement and subsistence in Tauranga Moana are likely to have remained fairly constant, although some elements of the Māori diet changed significantly over time (as happened elsewhere in New Zealand). At all times, Tauranga Māori relied on harvesting resources from the seas (particularly from the rich inshore waters and shores of Tauranga Moana) and the ngāhere (or forests). With access to a varied and reliable range of foods from a diverse range of habitats, Māori flourished. The density of occupation around Rangataua, for example, is suggested by the pēpeha ‘ngā pāpaka o Rangataua’ (‘the crabs of Rangataua’), which likens their numbers to the multitudes of crabs on the mudflats.<sup>16</sup> Similarly, Anne Salmond has described Ngāti Kāhu when Pākehā first arrived as ‘among the most affluent people in this country’, having access to a wide range of resources – offshore and harbour fishing grounds, eeling pools in the river, fertile horticultural lands, and forests farther up the river.<sup>17</sup>

The dual focus on land and sea shaped traditional patterns of seasonal use and occupation that remained evident until very recently.<sup>18</sup> All hapū were careful to maintain use rights to both domains, as suggested by the whakataukī, ‘He kāinga tahi ka mate, he kāinga rua ka ora’ (loosely meaning, ‘people who have only one dwelling place may not do very well, but with more than one place to live, the people will flourish’).<sup>19</sup> The predominantly coastal hapū maintained rights to areas of forest inland on the flanks of the Kaimai Range. At various times from late summer through to autumn and early winter, they would travel there to harvest essential resources: kererū, for example, were best taken in May and June when they

14. Evelyn Stokes, *A History of Tauranga County* (Palmerston North: Dunmore Press, 1980), p 21

15. For traditional and historical evidence see Evelyn Stokes, *A History of Tauranga County*, pp 21–22, 45. Archaeology is only recently confirming what has long been known from traditional sources about the antiquity and density of Māori settlement in the region. See Warren Gumbley and Ken Phillips, ‘Papamoa Lowlands Archaeological Survey and Heritage Assessment’, report prepared for Tauranga City Council, 2000 (doc T27), pp 4–5; Richard McGovern-Wilson, brief of evidence, 26 October 2006 (doc T24), pp 8–9.

16. Colin Reeder, brief of evidence, 26 June 2006 (doc R30), pp 7–8

17. Anne Salmond, evidence to the Planning Tribunal, 1993 (doc A37(b), p 40); Antoine Coffin, ‘Changes in a Maori Community: Wairoa River Hapu of Tauranga: Report on social, economic and political conditions of Ngati Kahu, Ngati Rangi, Ngati Pango (Wairoa Hapu) 1830–1997’ (commissioned research report, Wellington: Waitangi Tribunal, 1997) (doc A76), p 19

18. See for example English translation of doc D13, undated (doc D13(a), p 9; Morehu Ngatoko Rahipere, brief of evidence, undated (doc F17), pp 2–3; Tai Taikato, brief of evidence, undated (doc J28), pp 3–4; Lance Hori Waaka, brief of evidence, 22 May 2006 (doc Q5), p 5; doc S16, p 4; Hine Thompson-Rauwhero, brief of evidence, 27 September 2006 (doc S39), p 5.

19. Evelyn Stokes, *Ngamanawa: A Study of Conflicts in the Use of Forest Land* (Hamilton: University of Waikato, 1983) (doc A11), p 3

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7.3.1

were fat and sweet after eating miro berries.<sup>20</sup> Hapū such as Ngāti Hinerangi (whose territory extended to Tauranga Moana from the forests west of the ranges) would make early summer expeditions to the seashore to harvest and preserve kaimoana for winter consumption. Arapera Nuku of Ngāti Hangarau was told by her tūpuna that:

from there (pointing to the sea) to Kaimai is where the people of Ngāti Hangarau used to travel backwards and forwards. That is where our mana whenua lay. In the new summer they came to the sea, to catch fish which they hung in the sun to dry, gather pipi and other food for drying. At night they lit a big fire and sat around talking about things relating to the sea . . .<sup>21</sup>

The resulting range of interests held by Tauranga Moana hapū is expressed in the Ngāti Ranginui whakataukī, ‘He kiekie ki uta, he tāmure ki te tai’ (‘Kiekie is found in the bush, and snapper at the coast’).<sup>22</sup> Tureiti Stockman illustrated how this principle shaped the rohe of his hapū:

The rohe of Ngāti Tapu extended from Pukehinahina all the way up to Maenene bounded by the Waiorohi Stream on the east and the Kopūrereroa Stream on the west. Maenene was an important source of timber and birds for Ngāti Tapu. Going back many generations all of the coastal hapu needed access to the bush for these purposes as there were no trees on the Te Papa peninsula and it was necessary to have access to these resources further inland. Those areas on the edge of the bush were also used for extensive gardens.<sup>23</sup>

Different ecosystems such as forest, rivers, and sea were thereby connected in a seamless web, into which the lives of the people were woven. In the words of another witness, ‘[t]he maunga, the forests, the rivers, and the people are all interconnected and interdependent on each other.’<sup>24</sup> Taiawa Kuka of Matakana Island put it in these terms:

the association of land and sea is our reality; the very essence of our being as it prevails in the day to day activities of our lives. The mix is in the air that we breathe, the sounds that

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20. Document J28, pp 3–4; doc D13(a), p 9; doc J31, p 8

21. Document D13(a), p 9

22. Anthony Fisher, Keni Piahana, Te Awanuiarangi Black, and Rahere Ohia, ‘The Issues Concerning the Use, Control and Management of Tauranga Harbour and its Estuaries’ (commissioned research report, Wellington: Waitangi Tribunal, 1996) (doc A50), p 110

23. Tureiti Ihaka Stockman, brief of evidence, undated (doc H6), p 4. With reference to the Kōpūrereroa Stream (or river), we note that ‘Kōpūrererua’ is the official LINZ designation. However, claimants in this inquiry have generally used the name ‘Kōpūrereroa’, and evidence from Ngāi Tamarawaho suggests that ‘Kōpūrererua’ applies only to that section of the river where it divides round an island: thereafter, as far as the river mouth, the correct name is ‘Kōpūrereroa’: Peter McBurney, ‘The Kingitanga and Other Rangatiratanga/Autonomy Movements in Tauranga, 1860–1960’ (commissioned research report, Wellington: Crown Forestry Rental Trust, 2002) (doc P15), p 172.

24. Morehu McDonald, ‘Ngāti Hinerangi Mana Whenua Report for the Tauranga Moana District’ (commissioned research report, Wellington: Crown Forestry Rental Trust, 2006) (doc T2), p 146; doc A50, p 113

we hear, the sights that we see, the emotions that we feel and the life-blood passed down through our tupuna to us today.<sup>25</sup>

Tangata whenua closely controlled access to and use of the ancestral taonga within their rohe. However, although they had possession and control, they never regarded themselves as the *owners* of ancestral taonga such as Tauranga Moana, their rivers and the mountains. Rather they were users and trustees – kaitiaki – of something ultimately possessed by their gods and ancestors, which they had a duty to pass on to their descendants. As Hugh Kawharu has put it, ‘it was land that possessed the people’.<sup>26</sup>

The tangata whenua of Tauranga Moana belong to the landscapes in which their whakapapa (ancestry) embeds them. Their ancestral landscapes are those places made sacred by the lives and deaths of their ancestors. These landscapes include natural features such as forests and rivers; physical formations such as mountains, valleys, harbours, and estuaries; and cultural features such as pā, kāinga, mahinga kai, and wāhi tapu.<sup>27</sup>

The ancestral landscape defines the relationship between tangata whenua and the natural environment; it is, quite literally, the embodiment of their cultural heritage.<sup>28</sup> The state of their ancestral landscapes is therefore ‘inextricably linked to Maori spiritual, emotional, physical and social well-being and is expressed through the ethic and practise of kaitiakitanga’.<sup>29</sup>

All key resources have their kaitiaki, their guardians. Acting as kaitiaki – exercising kaitiakitanga – ensured that the landscape’s resources were safeguarded. This responsibility was the corollary of the authority and control exercised by rangatira, or chiefs, over the environment and its resources in the name of their people. Besides kaitiakitanga, other key

25. Taiawa Kuka, brief of evidence on behalf of the Matakana Island claimants, undated (doc J21), p 3

26. Hugh Kawharu, ‘Land and Identity in Tamaki: A Ngati Whatua Perspective’, Hillary Lecture 2001, Auckland War Memorial Museum, Māori Court

27. Desmond Tatana Kahotea, ‘Tauranga Urban Growth Strategy: Cultural Resource Inventory – Features of Significance to the Maori Community (Tangata Whenua): A Report for the Tauranga District Council’, 1992 (doc A17), p 23

28. Several hapū adopted the concept of the ancestral landscape for this inquiry. See for example: doc U1, pp 124–125; counsel for Wai 947 claimants, closing submissions, 27 November 2006 (doc U14), pp 109, 111–112, 114–115; doc U31, p 28; Counsel for Wai 370 claimants, closing submissions, undated (doc U33), pp 20, 34–35; counsel for Wai 42(a) claimants, closing submissions, undated (doc U37), pp 2, 28. The concept is also consistent with the key legislation considered in this chapter. The Historic Places Act 1993 requires judging a place’s significance through assessing the ‘extent to which the place forms part of a wider historical and cultural complex or historical and cultural landscape’ (Historic Places Act 1993, s 23(2)(k)). The term ‘Ancestral Landscape’ was also part of the definition of historic heritage in the original Resource Management Act Amendment Bill No 23 2003, which made historic heritage a matter of national importance, but was deleted from the final version which became law. The wider landscape context must still be considered in assessing the significance of a site however, under s 2(1)(b)(iv). The concept is also incorporated as a key aspect of the Combined Tangata Whenua Forum’s report on cultural heritage for the SmartGrowth strategy. The Tauranga district plan treats the term as a synonym for ‘ancestral lands’. See Tauranga City Council, ‘Tauranga District Plan: Chapter 5: Heritage’, Tauranga City Council, <http://content.tauranga.govt.nz/districtplan/cd/files/Chapter5.pdf> (accessed 24 March 2009).

29. SmartGrowth 2003, p 11 (Desmond Tatana Kahotea, ‘A Study of Heritage in Tauranga Moana Since 1991’ (commissioned research report, Wellington: Crown Forestry Rental Trust, 2006) (doc T18), p 9)

cultural values such as whanaungatanga (family links) and manaakitanga (hospitality) also shaped the exercise of rangatiratanga or authority. Cumulatively, these concepts have established the tikanga, or principles, that define appropriate behaviour within the environment, and determine how the environment's resources should be used and managed.

Antoine Coffin of Ngāti Kāhu told us that 'being kaitiaki is a complex, dynamic and evolving philosophy and process centred around the relationships we have with the physical and metaphysical environment. It is practical and locally defined'.<sup>30</sup> Acting as kaitiaki required tangata whenua to guard and protect the mauri (life essence) of natural and physical resources for the benefit of present and future people.<sup>31</sup> Te Awanuiarangi Black, giving evidence for Ngāti Pūkenga, told us of the importance to Māori of the land and its mauri:

Māori tribes are products not only of genealogy but also environment, and more specifically locality. Nothing to a tribe is more important than its own locality, as it is the locality and the genealogy that makes an iwi an iwi. The land and its mauri give us life as tribal people. We are interconnected and interdependent. When mauri is affected things degenerate. This is where we find ourselves now. Our mauri has been affected; the mauri of our natural environment has been affected. We have been affected.<sup>32</sup>

The abundance of natural resources in Tauranga Moana reflected not only the health of the land's mauri, but the mana of its people. Mana was displayed by maintaining strong whanaungatanga connections, and by demonstrating manaakitanga to manuhiri. As part of the duties of kaitiaki, and to maintain their whanaungatanga links, tangata whenua permitted inland groups from Te Arawa and Waikato to access the resources of shoreline and sea along specified corridors, allowing them to stay at pre-determined campsites. As Hati Kuruangi of Ngāi Te Ahi explained:

they came and collected, they had their right of way, if they wandered out of their area they were told to go back smartly. So our people happily shared the kai, so long as it didn't disturb the relationships, and interfere with the rules of the sea.<sup>33</sup>

According to Anthony Fisher, Keni Piahana, Te Awanuiarangi Black, and Rahere Ohia, this willingness to share in the harvest from the moana 'demonstrates the underlying attitude towards the resource as a gift from Tangaroa'.<sup>34</sup> Hosting manuhiri in style and plenty also sustained the mana of the tangata whenua. The Ngāi Te Rangi chief Taiaho Hori Ngatai, for example, referred to Tauranga Moana when telling his guests 'Kaore koe e mate kai ana, anei taku mara kai' – 'You shall not go hungry, for here is my garden'.<sup>35</sup>

30. Antoine Coffin, brief of evidence, 26 June 2006 (doc R23), p 4

31. Document A50, p 114

32. Te Awanuiarangi Black, brief of evidence, 28 June 2006 (doc R45), p 9

33. Hati Kuruangi (doc A50, pp 107–108)

34. Document A50, p 108; doc R3, p 4

35. Document A50, p 35

**7.3.2 The coastal environment – a special taonga**

This entire framework of values and principles is most clearly demonstrated in the relationship between tangata whenua and the coastal environment – especially Tauranga Moana, the harbour on which so many Tauranga Māori depended. Many witnesses attested to the significance of this relationship, including Angela Marie Merewhiua Bennett of Ngāti Hangarau:

Wherever you are in Tauranga Moana, or whoever you are, living in this area had the same significance. It was to everyone within these bounds ‘Nga Kuri a Whareki Whareki’ our bountiful Moana of seafood. Our ancestors chose their landing place well.<sup>36</sup>

All the hapū whose heartland lies within the inquiry district maintained principal residences on the shores of Tauranga Moana. Tauranga Moana provided both immeasurably significant economic resources, and potent cultural symbols of the wealth and mana of the people. Anthony Fisher told us that ‘the essence of being Ngai Te Rangi, our customs, diets and values were all heavily influenced by the Harbour, estuary and coastal environment. This was a resource on which Ngai Te Rangi were almost totally dependent.’<sup>37</sup>

People who lived on islands – such as Matakana Island, where people could ‘take a step outside and in all directions, reap the once rich harvests of Tangaroa’<sup>38</sup> – were perhaps the most reliant on these resources. But the harbour and coastal environment provided *all* Tauranga hapū with an enormous range and quantity of kaimoana and mātaītai, including titiko, pūpū, kukuroroa, tio, kokoto, kuharu, pipi, tuangi, kuku, kanae, wheke, kahawai, pioke, tāmure, aua, arāra, haku, inanga, kōeaea, tuna, tarakihi, and pātiki.<sup>39</sup> Many witnesses told us of the former abundance of kai in the harbour.<sup>40</sup> Kihi Ngatai, for example, recalled as a young man ‘the pipi beds being so thick in the Harbour you could hear the snapper feeding on them at night time.’<sup>41</sup> Other witnesses recalled flounder being trapped with the feet, herrings scooped up by hand, and nets so overflowing with fish that they could not be hauled in; the nets had to be cut to set the excess free.<sup>42</sup>

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36. Brief of evidence of Angela Marie Merewhiua Bennett, undated (doc D17), p 3

37. Document R3, p 5

38. Document J21, p 3

39. Document A50, p 28

40. For example, Ngahuia Dixon, brief of evidence, undated (doc E4), pp 28–30; Haare Williams, brief of evidence, undated (doc E5), pp 7–8; English translation of document E6, undated (doc E6(a)), pp 2–4; Colin Reeder, brief of evidence, undated (doc E25), p 7; Peata McLeod, brief of evidence, undated (doc E26), pp 3–4; Morro River Peters, brief of evidence, undated (doc E27); doc Q5, pp 7–8; Kingi Kino Ranui, brief of evidence, 22 May 2006 (doc Q6), pp 3–4; Kihi Ngatai, brief of evidence, undated (doc Q13), pp 11–13; Hinerongo Taikato Walker, brief of evidence, undated (doc Q32), pp 4–5; Eddie Tiepa Bluegum, brief of evidence, 26 June 2006 (doc R8), p 6; Te Karehana Wicks, brief of evidence, 26 June 2006 (doc R25), p 3; Brian Dickson, brief of evidence, 26 June 2006 (doc R26), p 3; Iria Friconnet Stokes, brief of evidence, undated (doc R62), p 4

41. Document Q13, p 12

42. For example, Keni Piahana, brief of evidence, undated (doc G26), p 7; doc R3, p 9; doc A50, p 136

Tauranga Māori emphasised the depth and intimacy of people's association with the harbour. They also emphasised the wide-ranging nature of that association: not only was it an important source of food but it offered transport routes and places to play.<sup>43</sup> And then there was the spiritual dimension, as Te Awanuiarangi Black, on behalf of Ngāti Hē, described in the passage already quoted at the head of this chapter:

The Rangataua estuary is the life blood of our people, 'ngā wai koiora' that courses through our veins: its tributaries the Waitao, Kaitimako, Omatata, Otamarua, Te Waiū and Te Awanui are the veins that supply it, and thus us with life giving nutrients – life itself . . . all living breathing features of our ancestral landscape<sup>44</sup>

At a personal level, many witnesses described how such places had played integral parts in their lives. Te Aroha Luttenberger, of Ngāi Te Ahi, for example, recalled:

the Waimapu Estuary was also very much part of our universe. We knew every bit of it. We knew where the deep mud patches were, where the channel was in full tide, the safe places to swim, where to get the titiko, pipi, tuangi, tio and baby koura for bait.<sup>45</sup>

Similarly, Iria Fricconnet Stokes of Ngāti Kuku told us: 'Kaimoana was our lunch every day. The sea fed us and we swam in it all day. As my great great grandfather said – the sea was just an extension of our garden.'<sup>46</sup>

Stokes refers to the famous speech made by Taiaho Hori Ngatai to John Ballance, the Minister of Native Affairs, in 1885. That speech deserves to be quoted at length here, because it precisely captures the character and significance of Māori traditional rights to the fore-shore and its fisheries, and the nature of the rangatiratanga protected by the Treaty:

Now, with regard to the land below high-water mark immediately in front of where I live, I consider that that is part and parcel of my own land . . . part of my own garden. From time immemorial I have had this land, and had authority over all the food in the sea. . . . I am now speaking of the fishing-grounds inside the Tauranga Harbour. My mana over these places has never been taken away. I have always held authority over these fishing-places and preserved them; and no tribe is allowed to come here and fish without my consent being given. But now, in consequence of the word of the Europeans that all the land below high-water mark belongs to the Queen, people have trampled upon our ancient Maori customs and are constantly coming here whenever they like to fish. I ask that Maori custom shall not be set aside in this manner, and that our authority over these fishing-grounds may be upheld. The whole of this inland sea has been subdivided by our ancestors, and each portion belongs to a proper owner, and the whole of the rights within the Tauranga

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43. Document R30, p 8; doc Q13, p 5

44. Document Q34, p 3

45. Te Aroha Luttenberger, brief of evidence, undated (doc G27), p 4

46. Document R62, p 3

Harbour have been apportioned among our own different people; and so with regard to the fishing-grounds outside the heads: those are only small spots. I am speaking of the fishing-grounds where hapuku and tarakihi are caught. Those grounds have been handed down to us by our ancestors. This Maori custom of ours is well established, and none of the inland tribes would dare to go and fish on those places without obtaining the consent of the owners. I am not making this complaint out of any selfish desire to keep all the fishing-grounds for myself; I am only striving to regain the authority which I inherited from my ancestors. I ask that the Queen's sovereignty shall not extend to those fishing-grounds of ours, but remain out in the deep water away beyond Tuhua. These are all the subjects upon which we wish to hear your opinion . . . In our opinion they affect the Natives very deeply. I dare say some Natives have private matters to bring before you, but these matters which have been spoken about affect the whole of the people . . . the whole of the Maori people.<sup>47</sup>

As we have seen, Māori regarded the world as primarily the domain of atua, who controlled and constrained how people could use the environment. These powers were the source of all human authority. However, as Hori Ngatai's speech makes clear, people who possessed rangatiratanga over a resource had full authority to exclude other people from using it. As Ngatai explained, over and above their general status as users and kaitiaki of the moana, each hapū exclusively controlled parts of the harbour that everyone acknowledged were reserved for them. And Ngatai asserts that the entire harbour, as well as especially prized fishing grounds outside it, had been 'subdivided' and rights to them 'handed down to us by our ancestors'. Hapū sometimes referred to these grounds as their kāpata or pātaka – their food cupboards or storehouses – where resources were especially prodigious.

Hapū held the rights of rangatiratanga collectively. Through these collective rights over an area, individual members of the hapū obtained rights to use resources within it. Hori Paki Ross recalled that Waipu Bay was such a place for Ngāi Tūkairangi; there, they caught enormous quantities of snapper, pātiki, parore, kingfish, trevally and hāpuka.<sup>48</sup> Ngāi Te Ahi and Ngāti Ruahine had a similar relationship with Te Tāhuna o Waimapu.<sup>49</sup> According to Keni Piahana, the Waimapu Estuary is still:

the basis of identity, confidence and security of Ngai Te Ahi. The shape and form of the land, the river and streams, the wetlands and other aspects of the landscape or vista considered by them as heritage maintain other social and cultural associations.<sup>50</sup>

The division of the harbour into portions reserved for specific groups minimised conflict for resources and depletion of food stocks, since the possessors then had vested inter-

47. Hori Ngatai to John Ballance, 21 February 1885, AJHR, 1885, G-1, p 61 (Roimata Minihinnick, 'The Ownership of Tauranga Moana' (commissioned research report, Wellington: Waitangi Tribunal, [undated]) (doc A77), p 29)

48. Hori Paki Ross, brief of evidence, undated (doc Q14), p 8

49. Document R30, p 6; doc G26, p 6

50. Document G26, p 6



ests in maintaining their resources.<sup>51</sup> Thus, as Wendy Pond points out, within Māori society '[p]roperty rights were resource management rights.'<sup>52</sup>

Offshore islands such as Moturiki, Motuotau, Kārewa, Mōtiti, and Tūhua were also important sources of kaimoana and seabirds. Kārewa, for example, is a small offshore island several kilometres from Tauranga Moana; it was uninhabitable because of a lack of fresh water, but its resources were nevertheless very carefully allocated. Five Ngāi Te Rangi hapū had rights to harvest the island's tītī (muttonbirds) and taonui (black petrels), and abundant kaimoana such as hāpuka, snapper, kahawai, crayfish, and cod. Kihī Ngatai records that a series of hui resolved that each hapū was allocated different times at which to visit the island, and that no other people could visit the island without the consent of all hapū.<sup>53</sup>

Kaitiaki maintained healthy stocks of their resources by adopting resource management strategies and practices that were laid down according to tikanga and kawa, and designed to maintain order and balance between people and the natural world.<sup>54</sup> These included practices such as gifting the first catch to Tangaroa, never processing seafood on the shore, never taking more than was needed, rotating the shellfish beds to be harvested, and imposing rāhui – restrictions on when or where a resource could be harvested – that protected at-risk resources. Resources were typically harvested when and where they were in best condition and most abundant. Kina, for example, were taken in summer when the flowering of the pōhutukawa signalled they were plentiful and fat.<sup>55</sup> The overarching ethic of Tauranga Māori, as throughout Māoridom, was to never waste the gift of the resource and to husband it for the future.<sup>56</sup> As Heeni Murray of Matakana put it:

Kaimoana was never wasted. It was shared out, hung on the fences for pawhara or merely returned to the moana. There was always a plentiful supply of seafood to serve to manuhiri who were provided with all forms of fish, fresh, raw, smoked and varieties of shellfish, all served in large quantities. These are cultural traditions that have been part of our very essence as Maori since before the Treaty.<sup>57</sup>

Even today, the ability to provide kaimoana directly reflects the mana of Tauranga Māori. Evelyn Stokes stressed this point to us:

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51. Document A50, p 21

52. Wendy Pond, *The Land With All Woods and Waters*, Rangahaua Whānui Series (Wellington: Waitangi Tribunal, 1997), p 14

53. Statement by Kihī Ngatai, 11 December 1995 (doc A77, app 2)

54. Document R45, pp 7–9

55. Document A50, pp 129–130; doc R26, p 5

56. See for example Evelyn Stokes, 'Contesting Resources: Māori, Pākehā, and a Tenurial Revolution', in *Environmental Histories of New Zealand*, edited by Eric Pawson and Tom Brooking (Melbourne: Oxford University Press, 2002), p 36.

57. Heeni Murray, brief of evidence, undated (doc J22), p 10



The mana of the tribes of Tauranga Moana has traditionally been associated with their control of kaimoana . . . The mana of the tribes today is still measured by their ability to provide a wide variety of seafoods at marae gatherings . . .<sup>58</sup>

Some foods have particular value as the mana kai, or kai wairua, the particular food symbolising the mana of the people and place. For the hapū of Ngāti Pūkenga, Ngā Pōtiki a Tamapāhore, and Ngāti Hē of Ngāi Te Rangi, this special delicacy is the titiko, the periwinkle or mud snail. For Ngāti Tapu (also Ngāi Te Rangi), it is the pūpū, the catseye; for Ngāti Kuku, it is the kuku, the green-lipped mussel.<sup>59</sup> The ability to amply provide manuhiri with these traditional foods is critical to demonstrating manaakitanga and whanaungatanga, and to fulfilling the role of kaitiaki. As Ngahuia Mereana Dixon told us:

when people have travelled to Maungatapu or other Rangataua marae, titiko on the table would be their way of gauging manaakitanga or looking after people . . . The measure of the iwi is the food served out to manuhiri . . .<sup>60</sup>

### 7.3.3 Forests and freshwater

Though kaimoana was vitally important to the diets of all Tauranga Moana hapū, some also relied greatly on the varied resources of the forests of the inland ranges, and the freshwater rivers and streams. For Ngāti Hinerangi, for example, the forests were and are ‘the provider and sustainer of all things’, as Morehu McDonald explained:

It is the provider of food in the form of bird life such as the tui, kakariki, kereru and many more different species of flora and fauna that were known to Ngāti Hinerangi as their traditional food sources. These included among others pikopiko, mushrooms, kiore, huhu grubs, fresh water koura, tuna, and many more . . . It was the provider of shelter in the form of trees such as rimu and kahikatea, totara and also kauri to be used as material for buildings and other forms of construction. It is the provider of clothing in the form of kiekie and harakeke from the sheltering swamps. It is the provider of art and other visual art forms such as wood for carvings for wharenui and pataka and also for providing dyes and colourings for carvings, and clothing. It is the provider of transport with the provision of totara and other trees for the building of waka. It is the provider of the means of war by the provision of hard woods such as kanuka and manuka for the making of weapons. It is also the means of sustaining life by the provision of firewood for heat and for cooking food. It is the provider of traditional and customary beliefs and practices by tribal elders who

58. Evelyn Stokes, ‘Te Raupatu o Tauranga Moana: Documents Relating to Tribal History, Confiscation and Reallocation of Tauranga Lands’, 2 vols (commissioned research report, Wellington: Waitangi Tribunal, 1993) (doc A18), vol 2, p 39

59. Document A50, p 28

60. Document E4, p 29

were entrusted with the transmission of esoteric knowledge for the maintenance of traditional Ngāti Hinerangi society from one generation to another. It is the provider of rongoa Maori or medicines and herbal remedies for ailments and to protect life. It is the provider of sanctuary and security . . .<sup>61</sup>

Waiora Nuku, of Ngāi Tamarāwaho, who lived at Taumata, gave us a vivid description of the range of resources she and her family harvested from the ngāhere. Besides their bush gardens, they hunted wild pigs and kererū, climbed for kareo and miro berries, and the hearts of whanake and kiekie, collected pikopiko as well as harore (bush mushrooms), and used their own rongoa (medicine) such as mamaku.<sup>62</sup>

Rivers and streams provided ecologically and culturally critical connections between the ecosystems of forest and sea. The majority of New Zealand's freshwater fish spend part of their lifecycle in salt water. Inanga (whitebait) and tuna (eels), the most significant traditional foods for Tauranga Māori, rely on healthy and relatively stable ecosystems in and alongside rivers, at sea, and on the shore, to where many such species travel to spawn.

For Tauranga Māori, rivers were also vital transport routes as well as sources of food and other resources.<sup>63</sup> Some Tauranga hapū are very closely associated with key waterways. Ngāti Kāhu, Ngāti Pango, and Ngāti Rangi are kaitiaki of the Wairoa River, and are sometimes known collectively as 'the Wairoa hapū', while Ngāi Te Ahi and Ngāti Ruahine are closely associated with the Waimapu River.<sup>64</sup> Ngāti Motai and Ngāti Mahana gathered eels, freshwater crayfish, trout, and watercress from the waterways of the Kaimai, often travelling along the rivers and streams through to Tauranga Moana.<sup>65</sup> For all these hapū, their rivers are 'the passage way, carriage way, food and spiritual source of our people past, present and future'.<sup>66</sup> Particularly important rivers, such as the Wairoa, were awa tupuna, and recited as a key element that identified a person as belonging to that river when addressing others. The taniwha (spirits) that lived in these rivers were also their kaitiaki, and watched over the people who belonged there – for example, preventing them from drowning.<sup>67</sup>

#### 7.3.4 Conclusions

Many claimant witnesses testified that their ancestral lands, kāinga, forests, waterways, and fisheries were, and remain, taonga. These elements combined to form their ancestral landscape – their tūrangawaewae, or place to stand – which defined and embodied their cultural

61. Document S43, pp 3–4

62. Waiora Nuku, brief of evidence, undated (doc F21), pp 3–5

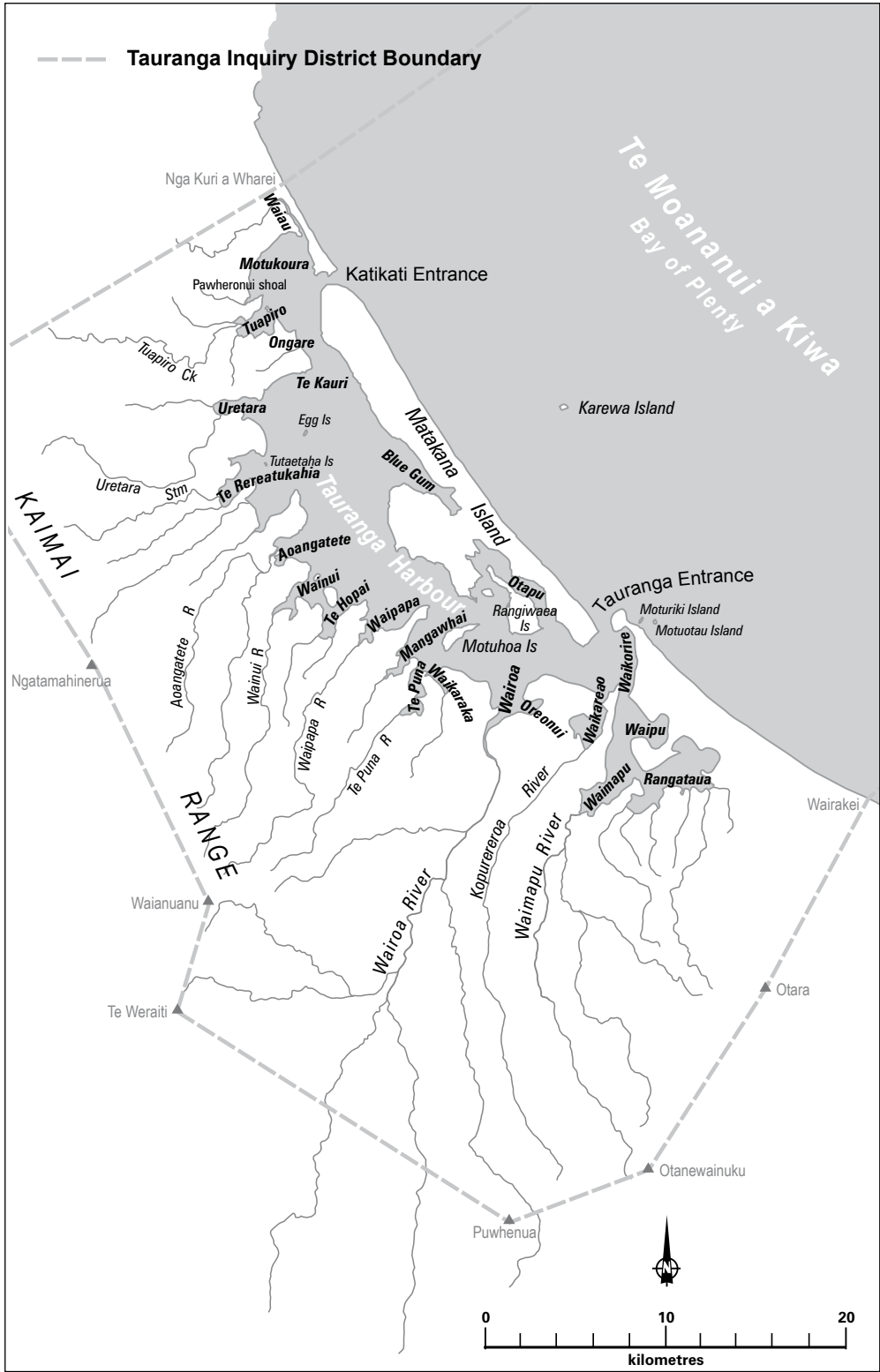
63. See for example Rachael Willan, 'Wairoa River Report' (commissioned research report, Wellington: Waitangi Tribunal, 1996) (doc A33), pp 7–10.

64. Document U37, p 3; doc R23; doc A28, p 10; doc A76, pp 5, 16–17; doc G26, p 6; doc U1, p 8; doc U33, p 34

65. James Timothy Clair, brief of evidence, 25 September 2006 (doc S8), p 10

66. Unidentified Ngāti Kāhu (doc D1, p 19)

67. Document A37(b), pp 67–68



Map 7.1: The waterways of Tauranga Moana



Figure 7.1: The Wairoa River, near Tauranga, circa 1918

Photograph by Frederick George Radcliffe. Reproduced courtesy of the FG Radcliffe Collection, Alexander Turnbull Library (G-6933-1/2).

identity. This ancestral landscape was therefore a trust that Tauranga Māori were bound to pass on to their descendents.

Many individual components of the ancestral landscape are undoubtedly taonga, including urupā, wāhi tapu, kāinga, mahinga kai sites, and certain maunga (mountains) and awa (rivers) of particular significance. However, they cannot simply be considered as discrete components. As Desmond Kahotea points out:

The use of the concept ‘ancestral landscape’ has emerged where there has been a history of the artificial separation of cultural landscape into discrete and ‘manageable’ entities (sites and places) created for cultural resource management purposes . . . This approach isolates cultural sites from the cultural context for which they have been created and the meanings that remain for tangata whenua.<sup>68</sup>

The significance of any one taonga, considered as a component of the ancestral landscape, can only be understood within the context of the whole which gives it its meaning. The rights of rangatiratanga, and the responsibilities of kaitiakitanga, were directed towards

68. Document T18, pp 11–12

maintaining the integrity of the ancestral landscape, and with it the tribal identity of the people.

A strong spiritual link undoubtedly existed between each hapū and the lands and seas over which they held the rights of rangatiratanga and the responsibilities of kaitiakitanga. The exercise of their kaitiakitanga, and communal participation in gathering resources from these taonga, was key to maintaining the tribal identity of the people. It reinforced the bonds between the people, and between them and their tūpuna. As Taiawa Kuku explained: 'To take away any part of our land or sea is to nibble away at the very fabric of our being. Take away enough of our taonga and we simply cannot exist.'<sup>69</sup>

The underlying reasons for this were indicated to us by Mark Anthony Nicholas of Pirirākau:

Without our whenua tupuna, we cannot reach fulfilment, we maintain a state of stagnant waiting for generation after generation after generation. It is a numbness, a void, a return to the darkness where living was as nebulous as space and where thought was unable to be carried.<sup>70</sup>

It is self evident that Tauranga Māori no longer have authority and control over most of their ancestral landscape. Much of this loss is comparatively recent. Te Aroha Luttenberger remembered her kuia and koroua:

were very much in control of all things pertaining to the papakainga. Not so today. Strangers today dump their rubbish and old car wrecks over the cliff desecrating our urupa. They don't know there is an urupa there and they probably don't care . . .<sup>71</sup>

The gradual result is a loss of the ancestral landscape, and with it, tribal identity. As Huikakahu Kawe of Ngāi Te Ahi lamented,

Slowly we are losing our culturally identifiable footprints and our connections to significant sites. The land is being bulldozed and changed to such an extent that the relationship that we have with it is irrevocably changed. The contours of the land which we were connected with are now no longer there. We say to each other . . . 'Where has that hill gone that we used to play on? Ha, that's right, there it is.' It's now down in what used to be our swamp where houses now stand.<sup>72</sup>

In sum, the evidence of the many tangata whenua witnesses who appeared before us impressed on us the manifest depth and consistency of feeling for their remnant ancestral

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69. Document J21, p 3

70. Document B6, p 8

71. Document G27, p 4

72. Huikakahu Kawe, brief of evidence, 26 June 2006 (doc R21), p 6

landscapes, and the taonga within them. We now begin to examine how the Crown's actions and omissions affected those taonga and Tauranga Māori's relationship with them.

#### 7.4 HAS THE CROWN PROVIDED FOR THE RANGATIRATANGA AND KAITIAKITANGA OF TAURANGA MĀORI OVER THEIR TAONGA?

Article 2 of the Treaty guaranteed to Māori 'te tino rangatiratanga o ratou whenua o ratou kainga me o ratou taonga katoa'. In the English text, that article guaranteed to Māori 'the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession'. Article 3, in both languages, guaranteed to Māori the full rights of citizenship.

There is an inevitable tension between the two versions of article 2, since each expresses concepts deeply embedded in different cultures. In particular, the implications of the term 'te tino rangatiratanga' have been much debated. On the basis of the claimants' evidence, and building on previous Tribunal findings, we consider that the term means that Māori were guaranteed full authority and control over their property and taonga.<sup>73</sup> In particular, we follow the *Muriwhenua Fishing Report* and the *Ngai Tahu Sea Fisheries Report*, each of which referred to three main elements of the Treaty guarantee of tino rangatiratanga over taonga: authority or control that is exercised in recognition of the spiritual source of the taonga, and extends over both property, and over the people within the kinship group.<sup>74</sup>

Tino rangatiratanga must not be confused with modern ownership. Thus, individual Māori may now own (in the modern sense) lands over which their hapū retains rangatiratanga.<sup>75</sup> However, as Tribunal historian Ben White has noted, one of the key issues of the colonial encounter in New Zealand is '[the] way Maori were forced to reconceptualise their rights and customary law in order that they be cognisable under English common law'.<sup>76</sup> As we found in chapter 2 (see sec 2.11.4), the English word 'ownership', unlike 'rangatiratanga', does not convey the interlinked responsibilities of chiefs and their communities in regard to allocating use rights over land and resources.

We note that since the 1840s the Crown has accepted that, before the arrival of Europeans, Māori owned all the land and resources in New Zealand.<sup>77</sup> And, as several Tribunals have found, ownership is the closest expression known to English law for the nature and extent of the tino rangatiratanga, and full, exclusive, and undisturbed possession, that is

73. Waitangi Tribunal, *Te Ika Whenua Rivers Report* (Wellington: GP Publications, 1998), p 89; Waitangi Tribunal, *The Whanganui River Report* (Wellington: GP Publications, 1999), pp 282–283

74. Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report 1992* (Wellington: Brooker and Friend Ltd, 1992), p 111

75. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 121

76. Ben White, *Inland Waterways: Lakes, Rangahaua Whānui Series* (Wellington: Waitangi Tribunal, 1998), p 1

77. *R v Symonds* (1847) NZPCC 387 at 390; *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at 684

guaranteed in the Treaty.<sup>78</sup> The exercise of tino rangatiratanga over taonga within modern New Zealand's legal framework now requires either ownership or, where this is not possible, significant management rights recognised and provided for in statute. Such management rights provide another means by which to recognise tino rangatiratanga, and allow the expression of kaitiakitanga.

One consequence of the Tauranga raupatu was an increased reliance on the resources of rivers and seas.<sup>79</sup> However, by the early twentieth century Tauranga Māori had also lost possession of these environments. In the following section we outline how this occurred, and assess the Crown's role in light of its responsibilities under the Treaty.

#### 7.4.1 Tauranga Moana: ownership and Māori customary law

Several claims before us concern the loss of ownership of the foreshore and seabed, especially of Tauranga Harbour.<sup>80</sup> The Crown, however, has historically assumed both ownership of these taonga and the right to delegate powers to manage them. It reasserted ownership of the key marine environments in the Foreshore and Seabed Act 2004.

To determine whether the Crown breached the Treaty by appropriating ownership of Tauranga Harbour, its foreshore, and its seabed, we must address two key questions. First, did Tauranga Māori possess the harbour as their property under customary law at 1840? If so, by what ways and means did they lose possession of the harbour to the Crown?

Dispute between the Crown and Māori over ownership of the foreshore and seabed stems from two very different cultural and legal traditions about property. The Crown has acknowledged since 1847 that Māori owned all the land in New Zealand. But, under English law, the foreshore and seabed are strictly different categories of land, which are assumed to be the property of the Crown. Māori customs relating to 'ownership' of the sea, of the foreshore, and of their resources, did not share this peculiar compartmentalisation. As Chief Judge Jones of the Native Land Court recognised in relation to the Napier Harbour in 1920:

78. Waitangi Tribunal, *The Whanganui River Report*, pp 48–50; Waitangi Tribunal, *Rekohu: A Report on Moriori and Ngāti Mutunga Claims in the Chatham Islands* (Wellington: Legislation Direct, 2001), p 278; Waitangi Tribunal, *Te Ika Whenua Rivers Report*, pp 121–124; Waitangi Tribunal, *He Maunga Rongo*, vol 4, pp 1257–1258

79. The Tribunal in the stage 1 Tauranga raupatu inquiry did not discuss the ownership of the harbour, foreshore or waterways, or breaches of the Treaty in regard to these resources; all these issues were deferred to stage 2. Waitangi Tribunal, *Te Raupatu o Tauranga Moana*, p 309

80. The foreshore is 'the intertidal zone, the land between the high-and low-water mark that is daily wet by the sea when the tide comes in'. The seabed is 'the land that extends from the low-water mark, and out to sea'. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wellington: Legislation Direct, 2004), p xi. Claims regarding the ownership of the foreshore and seabed include Wai 42(a) Wairoa hapū; Wai 211 Ngāi Tūkairangi; Wai 227 Pirirākau; Wai 228 Matakana Island hapū; Wai 342 Ngāti Hē; Wai 362 Ngāti Ruahine; Wai 454 Marutūāhu; Wai 489 Ngāti Kuku; Wai 540 Te Rūnanga o Ngāi Te Rangi; Wai 546 Ngāti Tapu; Wai 611 Ngāti Ranginui; Wai 637 Ngāti Pūkenga; Wai 650 Hauraki Māori Trust Board; Wai 664 Waitaha; Wai 672 Ngāti Hangarau; Wai 708 Leef whānau; Wai 715 Te Uretureture Charitable Trust; Wai 717 Ngā Pōtiki; Wai 751 Ngāti Pūkenga; Wai 778 Ngāti Tamatera; Wai 938 Ngāi Tauwhao ki Ōtāwhiwhi; Wai 1178 Ngāti Te Puku o Hakoma; and Wai 1226 Ngāti Tokotoko and Ngāti Hinerangi.



Maori rights were not confined to the mainland, but extended as well to the sea. These rights were exercised principally for the procurement of food, and would have special significance in an inland sea of this nature; but they were no less applicable to the ocean.<sup>81</sup>

As suggested by Hori Ngatai's speech quoted earlier, traditional rights to the foreshore and sea were typically asserted by those who possessed authority over adjacent lands. The Tribunal's *Report on the Crown's Foreshore and Seabed Policy* summarises the general position: 'Māori law, use, authority, and rights extended seamlessly from land fronting the beach, out into the ocean.'<sup>82</sup> However, as Alan Ward has noted:

possession of, and access to, foreshores was a jealously guarded right. Where there were many claimants, these rights would be, as they were with respect to desirable areas of land, complex, overlapping, and contestable . . .<sup>83</sup>

In many instances, if not most, it is a more accurate description of Māori customary tenures, therefore, to say that different groups possessed rights in an area, rather than to try and decide that a particular group wholly possessed or owned an area.

This was certainly the case with Tauranga Moana. Hamuera Paki, for example, giving evidence for Ngāti Kuku in hearings over disputed interests in the Te Maire block in 1883, said that:

Te Puru's people own Te Pataitai – whose kai are pipis. When the tide comes in Te Pataitai's claim is under water – but Te Puru can't claim all the land on this claim of Te Pataitai . . . There is also a Toka [fishing rock], Marutuahu, near Moturiki where they, Ngaitukairangi, used to fish before they fished at Te Maire. The tohus [leading marks] of that toka are on the land under hearing, I allow that . . . [but] . . . I say that Te Maire is in the sea not on shore. Ngatikuku own the shore. I don't dispute that Hohepa owned Te Maire . . . but he never fished the eels on the block.<sup>84</sup>

Hamuera here acknowledges that Ngāi Tūkairangi 'owned' Te Maire, which is a 'toka tamure' (a fishery for snapper), and Te Puru, of Ngāi Tūwhiwhia, 'owned' the pipi beds named Te Pataitai. But, he emphasises, Ngāti Kuku – his people – 'owned' the adjacent shores. He supports his claim to the land by reference to his people's cultivations and their taking of eels and mānuka. His claim to 'the sea board' stemmed from 'a "rahui karoro" from the Tupunas'. He explains that:

81. Cited in Richard Boast, *The Foreshore*, Rangahau Whānui Series (Wellington: Waitangi Tribunal, 1996), p 17

82. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 18

83. Alan Ward, *National Overview*, 3 vols (Wellington: GP Publications, 1997), vol 2, p 337; Boast, *The Foreshore*, p 21

84. The "Lands Returned": Records of Commissioner Brabant's Court, 1881–1886, Brabant's Notes, 10 February 1883 (doc A18, pp 332–333); see also doc A77, pp 11–12



Our people used to feed the adult karoro's [black backed gulls] and only take the young ones. Each had his own birds and no one was allowed to touch another's birds. When I grew up Europeans were in the land and we left off feeding karoro's and the old customs.<sup>85</sup>

Hamuera's evidence illustrates the nature of Māori customary tenure, a complex system of overlapping and interlocking rights of use and occupation, with very limited rights of alienation.<sup>86</sup>

Ngatai's speech to the Native Minister, Ballance, (quoted earlier) is a clear demonstration that such customary tenures in Tauranga Moana extended to the waters and fisheries of the sea. He considered that 'the land below high-water mark' immediately in front of where he lived, was simply 'part and parcel of [his] own land'. Moreover, he said:

The whole of this inland sea has been subdivided by our ancestors, and each portion belongs to a proper owner, and the whole of the rights within the Tauranga Harbour have been apportioned among our own different people . . .

On the basis of such evidence, we have no difficulty in accepting that Tauranga Māori possessed areas of the foreshore and seabed of their moana at 1840 in precisely the same sense in which they possessed the surrounding land – that is, as a complex system of overlapping and interlocking rights and obligations.

#### 7.4.2 Crown displacement of customary title to Tauranga Moana

It was clear to Hori Ngatai in 1885 that the authority and mana of Tauranga Māori over their moana was threatened. European settlers had shown an early interest in the development of Tauranga Harbour. Edward Shortland, Protector of Aborigines in the Bay of Plenty area, wrote in August 1843 that, 'During the early intercourse of Europeans with New Zealand[,] Tauranga became of much consequence as a port' – because Tauranga Harbour provided the only safe, all-weather, deep-water berth between Auckland and Wellington.<sup>87</sup>

In the years immediately before Ngatai's speech, local authorities had renewed their efforts to gain ownership and control over the harbour and foreshore. These began in 1874, the year after the Government established the port of Tauranga.<sup>88</sup> The Auckland Provincial Council requested a Crown grant of the Tauranga foreshore (under the Public Reserves Act 1854) in order to develop the harbour. The request was rejected on the ground that the

85. The "Lands Returned": Records of Commissioner Brabant's Court, 1881–1886, Brabant's Notes, 10 February 1883 (doc A18, pp 331–332)

86. See Stokes, 'Contesting Resources: Māori, Pākehā, and a Tenurial Revolution', in *Environmental Histories of New Zealand*, edited by Brooking and Pawson, p 36

87. Edward Shortland (quoted in Evelyn Stokes, *Wiremu Tamihana: Rangatira* (Wellington: Huia, 2002), p 117); Giselle Byrnes, 'A Preliminary Report on the Use, Control and Management of the Tauranga Harbour' (commissioned research report, Wellington: Waitangi Tribunal, undated) (doc A36), p 5

88. Document A36, p 14; doc D7, p 45

## TAURANGA MOANA, 1886–2006

7.4.2



**Figure 7.2: Early reclamation: the Strand and Victoria and Town wharves, late nineteenth century**

Photographer unknown. Reproduced courtesy of the Press Collection, Alexander Turnbull Library (G-017643-¼).

‘importance to the Colony of the conservation of harbours, and rivers is so great that it is held that grants of foreshores ought not to be made except with the special authority of Parliament.’<sup>89</sup>

Two years later, Tauranga County Council was established, with authority to control ferries and to construct bridges, quays, wharves, and docks.<sup>90</sup> The council immediately began to reshape the harbour to suit shipping. In 1878, it planned to stake out the Katikati and Te Puna Channels so that a steam launch service could commence; it is unclear whether this work proceeded, as the pilot and harbour master maintained he lacked sufficient authority from the Government.<sup>91</sup> But, by the early 1880s, the Town and Victoria wharves had been built, and the first of several major reclamations along The Strand had been made. Within the harbour itself, a channel was now marked with beacons, and rocks had been destroyed to ease ship movements.<sup>92</sup>

89. Document D7, p 45

90. Ibid, p 44

91. Barbara Oram, ‘The Port of Tauranga’, in AC Bellamy (ed), *Tauranga 1882 – 1982* (Tauranga: Tauranga City Council, 1982), p 234

92. Document D7, pp 45–46

The Tauranga Borough Council, established in 1882, was given jurisdiction over the town area down as far as the high water mark.<sup>93</sup> This granted Tauranga settlers a significant degree of power and autonomy, and they immediately sought to extend their authority over the harbour as well. In 1884 and again in 1886, the council tried, unsuccessfully, to set up a harbour board. Disagreements over financing the prospective board's operations, however, meant that the council failed to get the necessary Bills through Parliament.<sup>94</sup>

It was within this context that Hori Ngatai contested the assumptions of power and authority by local bodies and the Crown. He protested against the 'work of the Europeans that all the land below high water mark belongs to the Queen' and the encroachment on Māori authority and property rights by Europeans who 'trampled over our ancient Maori customs'. He asked not only that Ngāi Te Rangi have their customs and authority upheld, but also that 'the Queen's sovereignty shall not extend to those fishing grounds of ours, but remain out in the deep water away beyond Tuhua'.<sup>95</sup>

On the critical question of the Queen's authority below high-water mark, Ballance replied:

This is a question of law, and depends on the construction that is placed on the Treaty of Waitangi. It is an important question, and I shall submit it to the Law Officers of the Crown upon my return to Wellington. If those rights were ceded by the Treaty, they are in the Queen; if they were not distinctly withheld they are also in the Queen, for the Queen in all her dominions owns the land between high- and low-water mark. It is not the wish of the Government to restrict or to curtail Maori customs, unless the Natives wish it themselves; and therefore I shall make careful enquiry into the subject.<sup>96</sup>

There are no indications, however, that Ballance – who, as we have seen, was the only prominent settler politician of the time to meet with Tauranga Māori – ever made the careful inquiry he promised.<sup>97</sup> Tauranga Māori were left in an invidious position. The commissioners deciding titles in Tauranga (after it was decided to return confiscated land) regarded their jurisdiction as ending at the high water mark. They declined repeated requests from Tauranga Māori to decide title to 'Salt water marshes (where birds and eggs are obtained)', and 'Sand flats & Islands covered at high water (where shellfish are obtained), & fisheries within the harbour'.<sup>98</sup> This was a carefully considered refusal for, as Commissioner Herbert Brabant took pains to point out to his superiors, Māori complaints were 'intended to open

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93. Ibid, p 44

94. Ibid, p 51, fn 74

95. Ngatai to Ballance, 21 February 1885, AJHR, 1885, G-1, p 61 (doc A77, p 29)

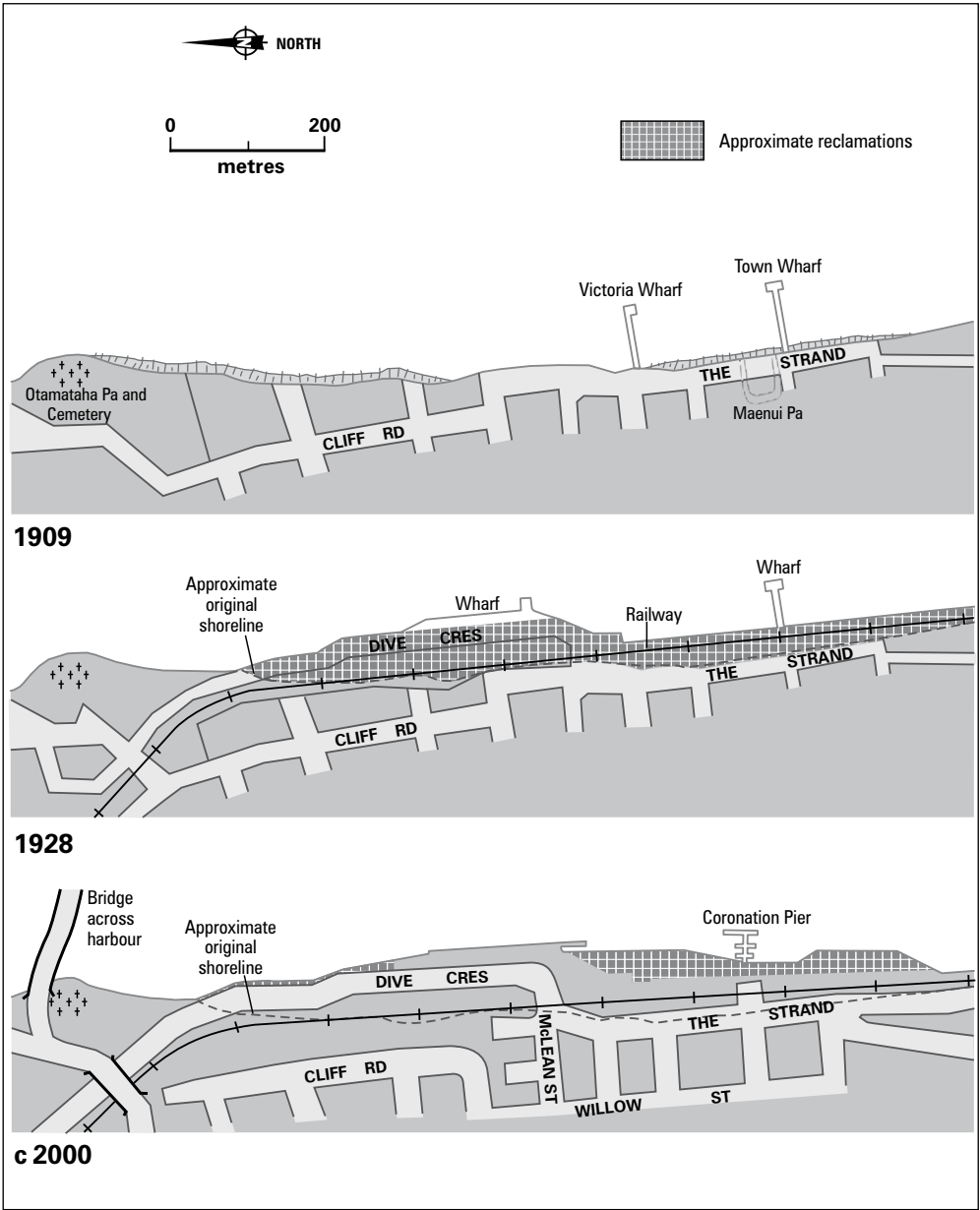
96. 'Notes of a Meeting between the Hon. Mr Ballance and Tauranga Natives, at Whareroa, Tauranga, on the 21st February 1885'; 21 February 1885, AJHR, 1885, G-1, p 62

97. Document D7, p 42

98. Brabant to Lewis, 2 February 1888, DOSLI Hamilton confiscation file 5/18, 'Papers on Awards in Katikati Te Puna Purchase' (Waitangi Tribunal, Raupatu Document Bank, 139 vols (Wellington: Waitangi Tribunal, 1990), vol 127, pp 48,881, 48,883 (doc A77, pp 31–32)

7.4.2

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a very large question'. Any recognition of these fishery claims might, he feared, result in Māori 'preventing all fishing by Europeans in the harbour'.<sup>99</sup> Thus, in Tauranga, Crown officials simply refused to address this 'very large question' – which, of course, had much broader implications than control of fisheries alone.<sup>100</sup> Elsewhere, however, the Crown and courts were greatly exercised by the very points that Ngatai had raised.

That the Crown is the presumptive owner of the foreshore and seabed by prerogative right is a central precept of English common law. The common law allows that other parties can claim title to portions of foreshore or seabed, though the burden of proof rests with them to prove the rightful displacement of Crown ownership. This can be done by a Crown grant, or by 'continuous occupation of sufficient duration for a grant to be presumed or a title by limitation acquired'.<sup>101</sup>

However, it is also a precept of common law that a transfer of sovereignty cannot, of itself, extinguish aboriginal or native property rights. This is the doctrine of aboriginal title. A critical aspect of this doctrine is that the nature of native or customary title is decided by reference to native – Māori – custom and law, and not according to English conceptions. And, as we have seen, Māori hapū universally and unequivocally asserted rights to the foreshore and seabed.

The question remained whether these rights amounted to ownership in the English sense – and a particularly significant issue there was whether Māori customary rights could be the source of freehold title to the foreshore. In the early decades of Crown control, officials were well aware that to establish Crown title to the foreshore, they had to clearly extinguish native title. They believed that their purchases successfully did so.<sup>102</sup> Initially, the Native Land Court also awarded Crown freehold grants to Māori that included the foreshore. After 1870, however, the court generally accepted only that Māori could establish an exclusive right of fishery, and held that customary rights were not sufficient to establish freehold ownership over the foreshore (though at least one judge of the Native Land Court subsequently issued titles to the foreshore based on ancestral occupation).<sup>103</sup> As the actions of the Crown officials in Tauranga clearly show, the Crown was reluctant to allow Māori to establish even these exclusive fishery rights.

By ruling that Māori customary rights did not amount to full property rights over the foreshore, the courts opened the way for the Crown to assume a general claim under the common law to ownership of the foreshore. Under the common law, unless contravened by a Crown grant, or by proof of use rights entitling citizens to such a grant, the Crown was the

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99. Ibid

100. Ibid

101. Kent McNeil, *Common Law Aboriginal Title* (Clarendon Press: Oxford, 1989), p 105

102. Boast, *The Foreshore*, pp 30–31

103. Ibid, pp 32, 34–35

presumptive owner of the foreshore. Further, under the common law the Crown owned the seabed as far out as territorial sovereignty was asserted.<sup>104</sup>

Beginning with the Harbours Act 1878, the Crown passed a series of statutes that presumed its general claim to the foreshore was securely founded in common law. The Act provided that only the Crown could make grants to the foreshore, and then only by Acts of Parliament.<sup>105</sup> This provision, as incorporated in subsequent legislation, was regarded as the principal statutory foundation for Crown ownership of the foreshore until the passing of the Foreshore and Seabed Act 2004.<sup>106</sup> As the *Muriwhenua Fishing Report* found, in practice it ‘put paid to any contention that the Crown’s common law right to the foreshore was subject to customary usage.’<sup>107</sup>

Subsequent governments increasingly acted on the assumption that the Crown simply ‘owned’ the foreshore.<sup>108</sup> In Tauranga, the question of ownership was effectively decided by the vesting of ‘[a]ll the foreshore of the Tauranga Harbour’ in the Tauranga Harbour Board, via the Tauranga Foreshore Vesting and Endowment Act 1915.<sup>109</sup>

The harbour board had been set up by statute in 1912. In introducing the Bill to the Legislative Council for its second reading, the Honourable Thomas Thompson (member for Auckland) stated that there was ‘no objection whatever’ to setting up the board, and the proposal had ‘the approval of all concerned.’<sup>110</sup> The board’s first meeting was held on 5 March 1913, with a membership that appears to have been entirely Pākehā. The Harbours Act 1908, the Tauranga Harbour Act 1912 that established the board, and then the Tauranga Harbour Amendment and Foreshore Vesting Act 1917 – all concerned with composition of harbour boards generally or Tauranga in particular – contained no provision for representation of local iwi or hapū.<sup>111</sup> There is no indication that Māori were consulted over the Crown’s subsequent transfer of ownership and power to the Tauranga Harbour Board.<sup>112</sup> Later Acts passed in 1948 and 1950, and a Government inquiry in 1944 continued this pattern.<sup>113</sup>

In establishing the harbour board, the 1912 Act defined the Tauranga Harbour District as comprising the districts of both the county and the borough. The board took over from those bodies the ownership of any existing harbour structures such as wharfs and sheds. The harbour area itself was defined in the Act as ‘the Port and Harbour of Tauranga, the

104. Waitangi Tribunal, *Report on the Crown’s Foreshore and Seabed Policy*, p 29

105. Document A77, pp 26–28; Boast, *The Foreshore*, p 34

106. Richard Boast, ‘Te Whanganui-a-Orotu (Napier Inner Harbour) 1851–1991: A Legal History’ (commissioned research report, Wellington: Waitangi Tribunal, 1991) (doc A14), p 51

107. Waitangi Tribunal, *Report on the Muriwhenua Fishing Claim*, p 85

108. Boast, *The Foreshore*, p 38

109. Document A77, p 51; doc A36, pp 16–18

110. Document A36, p 16; Thomas Thompson, 18 October 1912, NZPD, 1912, vol 161, p 399

111. Document A36, pp 17–19

112. *Ibid*, p 58

113. *Ibid*, pp 9–12

Port and Harbour of Katikati, the Kaituna River so far as it is navigable, the Estuary of Waihi South, and the respective entrances thereto.<sup>114</sup>

Within a few months of its inception, the harbour board sought the advice of the Minister of Marine as to how it could have the foreshore vested in it. In 1915, Parliament passed the Tauranga Foreshore Vesting and Endowment Act, under which the board acquired:

All the foreshore of the Tauranga Harbour commencing at the north head, Katikati entrance, and thence following the mainland to the headland at Mount Maunganui opposite the Beacon Rock at the Tauranga entrance to the harbour<sup>115</sup>

Also included were various parcels of land bordering the harbour.<sup>116</sup>

In 1917, Parliament extended the Tauranga Harbour District to take in ‘the Te Puke Town District, the Matata Riding of the Country of Whakatane, the County of Rotorua, and the Town of Rotorua.’ It also extended the board’s control to include the harbour foreshore of Matakana Island.<sup>117</sup> Tauranga County and Borough Councils and the Railways Department were consulted before the initial foreshore vesting; Tauranga Māori were not. These Acts, like those that preceded and would follow them, contained no reference to Māori or their interests in the harbour and foreshore.<sup>118</sup>

In passing these Acts, and assuming the authority to vest title to Tauranga and other harbours in various boards, the Crown ignored unease in the Crown Law Office over whether the Crown’s own claim to title under common law was secure.<sup>119</sup> In fact, in a landmark case in 1963, the courts found that the Crown had no valid claim to the foreshore under common law, but that Māori aboriginal or customary title had nevertheless been validly extinguished by the issuing of Crown grants by the Native Land Court.<sup>120</sup> This finding, however, was overturned in the 2003 Court of Appeal judgment in the *Marlborough Sounds* case. There, Elias CJ stressed that:

The common law as received in New Zealand was modified by recognised Maori customary property interests. If any such custom is shown to give interests in foreshore and seabed, there is no room for a contrary presumption derived from English common law. The common law of New Zealand is different.<sup>121</sup>

In short, the court reiterated the central precept of the doctrine of aboriginal title; that Māori customary title to the foreshores and seabed remained intact until properly

114. Ibid, p 16; Tauranga Harbour Act 1912, ss 3, 4, and 7

115. Document A36, p 23; doc D7, p 51; Tauranga Foreshore Vesting and Endowment Act 1915, ss 3, 5, sch 1

116. Tauranga Foreshore Vesting and Endowment Act 1915, sch 2

117. Tauranga Harbour Amendment and Foreshore Vesting Act 1917, s 4, sch

118. Document A36, p 23

119. Waitangi Tribunal, *Report on the Crown’s Foreshore and Seabed Policy*, p 30; Boast, *The Foreshore*, pp 41–42

120. *In re the Ninety-Mile Beach* [1963] NZLR 461, at 462; see Richard Boast, *Foreshore and Seabed* (Wellington: Lexis Nexis, 2005), pp 70–71

121. *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at 668



extinguished. The court held, further, that neither the sequence of general statutes beginning with the Harbours Act 1878, nor the processing of customary land through the Native Land Court, were sufficiently clear and explicit to extinguish Māori customary rights to land in the adjacent foreshore and seabeds.<sup>122</sup> This decision therefore reopened the way for Māori to claim title to portions of the foreshore and seabed, either by seeking customary title through the Māori Land Court, or common law aboriginal title through the High Court.

The Court of Appeal did not discuss the factual question of the extent or nature of any customary property in foreshore and seabed. No applications were ever brought before the courts as a result of the Court of Appeal's decision, because the Foreshore and Seabed Act 2004 removed the courts' jurisdiction over those lands, foreclosing the possibility that Māori might successfully assert property rights in them. The nature and extent of the property rights that either court might have granted is therefore untested and remains unclear.<sup>123</sup>

In sum, by the 1880s, Māori and the Crown had assumed distinctly contrary positions as to who rightfully possessed and controlled the foreshore and seabed – positions that remain today. In Tauranga, these differences emerged over the question of who possessed and controlled Tauranga Moana. In practice, the Crown settled this question by passing a series of Acts that vested authority in bodies entirely composed of Pākehā settlers. With these Acts, possession and authority over Tauranga Moana passed from Tauranga Māori, without consultation – and, given the views expressed by Hori Ngatai in 1885, presumably against their will. Their harbour was under the direct jurisdiction of the Tauranga Harbour Board, and its control was backed by the full authority of the Crown. Henceforth, Tauranga Māori would struggle to assert their Treaty rights to participate in the management of the harbour before the Crown; the question of ownership was foreclosed.

#### 7.4.3 Rivers and waterways: Māori customary law and ownership

The Tribunal has previously considered the issues surrounding property and Treaty rights in rivers and other waterways at length.<sup>124</sup> We do not repeat their detailed analyses. Once again, the fundamental issue is the imposition of British common law over customary uses and tenure. Three particular issues require our attention here: did Tauranga Māori possess

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122. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, pp 42–43

123. *Ibid*, p 44

124. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui–Waitara Claim*, 2nd ed (Wellington: Government Printing Office, 1989); Waitangi Tribunal, *Report of the Waitangi Tribunal on the Kaituna River Claim*, 2nd ed (Wellington: Government Printing Office, 1989); Waitangi Tribunal, *The Mohaka River Report 1992* (Wellington, Brooker and Friend Ltd, 1992); Waitangi Tribunal, *Te Ika Whenua – Energy Assets Report 1993* (Wellington, Brooker and Friend Ltd, 1993); Waitangi Tribunal, *Te Ika Whenua Rivers Report*; Waitangi Tribunal, *The Whanganui River Report*; and Waitangi Tribunal, *He Maunga Rongo*.



customary or aboriginal title to rivers by law? If so, how did the Crown displace customary title? Were these ways and means consistent with the principles of the Treaty?

Waterways functioned as key cultural and spiritual markers of identity. For Ngāti Kāhu, Ngāti Rangi, and Ngāti Pango, for example, the Wairoa River is their awa tupuna, the river by which they mark their identity.<sup>125</sup> These Wairoa hapū maintain they never consented to their rights over the Wairoa River – which they claim as a taonga – being extinguished, and that those rights are still extant ‘in Treaty terms at least.’<sup>126</sup> They seek remedies such as the vesting of the bed, or the river, or both, in the hapū; exclusive or joint authority over the river; and compensation for the hydroelectricity schemes constructed in the river catchment.<sup>127</sup> Similarly, Ngāti Motai and Ngāti Māhana stressed the significance of waterways in the Kaimai Range, claiming them as taonga over which they ought to have significant management rights.<sup>128</sup> Generic closing submissions, adopted by several claimants, claim that both the Crown’s legislative assumption of title to the beds of navigable waterways, and the application of the common law to non-navigable waterways, expropriated Māori property rights without compensation, in breach of the principles of the Treaty.<sup>129</sup>

Because many rivers are taonga that are especially significant to Māori for economic, cultural, and spiritual reasons, the Tribunal has discussed the nature of Māori relationships to waterways many times. Waterways were regarded as ‘a whole and indivisible entity’ with a distinct personality.<sup>130</sup> Each river has its own life force, or mauri. Significant rivers are guarded by taniwha who protect the river and its people, provided that they respect the river. Several witnesses before us revealed something of the various taniwha who protected their particular rivers, and spoke of the behaviour required to avoid incurring the taniwha’s anger.

The rangatiratanga over rivers lay with the hapū, just as it did with land. It was hapū who exercised collective authority over their river, who as kaitiaki guarded the river’s mauri, husbanded its resources, and were in turn nurtured by the river. Different whānau and individuals had use rights to resources, such as a particular fishery, only by virtue of their membership of the hapū.<sup>131</sup> The essence of past findings, then, is that Māori hapū collectively held customary title over waterways just as they did over land. Crucially, waterways were ‘not something to be analysed by the constituent parts of water, bed, and banks, or of tidal and non-tidal, navigable and non-navigable portions’ as in English law. They were, rather, single beings, ultimately the domain of atua and ancestors, though possessed and controlled by

125. Document A37(b), p 12

126. Waitangi Tribunal, *Te Raupatu o Tauranga Moana*, p 309

127. Document U37, pp 26–27, 30

128. Counsel for Wai 255 and Wai 1340 claimants, closing submissions, 24 November 2006 (doc U11), pp 81, 84–85

129. Claimant counsel, submissions relating to rivers, harbours and foreshore and seabed issues at Tauranga (doc U18), p 23

130. *Te Rūnanganui o Te Ika Whenua Inc Society v Attorney-General* [1994], 2 NZLR 20 (CA) at 21; see also Waitangi Tribunal, *The Whanganui River Report*, p 39

131. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, pp 123–124

hapū.<sup>132</sup> Therefore, as the *Whanganui River Report* found, ‘Included in that possessed was the water. The river would be meaningless without it.’<sup>133</sup>

Māori customary or aboriginal title to rivers and waterways in Tauranga has been displaced through a combination of the raupatu and the application of the introduced law of New Zealand. Title of any sort was lost to the rivers and streams within the confiscated block. The only river of any size wholly within the confiscated block was the Kōpūrereroa River. However, the block was bounded to the west by the Wairoa River and to the east by the Waimapu River. Accordingly, title to the eastern side of the Wairoa River and to the western side of the Waimapu River was also lost.

Perhaps more importantly, the raupatu extinguished customary title to all the rivers in the Tauranga inquiry district. It is true that the confiscating Order in Council of 18 May 1865 does not specifically mention rivers.<sup>134</sup> However, the courts addressed this specific point in 1900 with respect to the Waikato River, where it was found that title to the river had been extinguished by the raupatu confiscation.<sup>135</sup>

The lands partly returned to Tauranga Māori by the Crown commissioners were Crown grants in fee simple, so that property rights to the river were shaped by English law, not customary law. Under the common law of England, rivers comprise riverbeds and banks (which can be owned) and natural water (which cannot be owned). At common law, the Crown owns the beds of tidal reaches. In 1903, the Crown in New Zealand extended its ownership to the beds of all navigable rivers, under section 14 of the Coal-mines Amendment Act 1903. It did so to protect the ‘national interest’ in economic use and development of major rivers, and to prevent private control of hunting and fishing.<sup>136</sup> The provisions of that statute have been retained by subsequent legislation, most recently in section 354 of the Resource Management Act 1991.

The only river in our inquiry district which might plausibly be partly navigable today is the Wairoa. The statutory definition of navigability is quite unclear, and the Crown neglected to advise us whether it claims ownership of the Wairoa on this basis. There is historical evidence of the river being used by commercial operators to raft logs downstream in the nineteenth century, but the McLaren Falls (19 kilometres up-river from Tauranga Harbour) clearly made the river as a whole non-navigable. In allowing dams to be built on the river by local authorities, the Crown clearly assumed ownership, yet their construction also affected navigability.<sup>137</sup>

Most, if not all, of the rivers and waterways in Tauranga Moana are non-navigable, and as such, their beds are owned by the adjoining (riparian) landowners to the midpoint of the

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132. Waitangi Tribunal, *The Whanganui River Report*, pp 39, 46

133. Ibid, p 262

134. Document A33, pp 19–20

135. Waitangi Tribunal, *The Whanganui River Report*, pp 17–18

136. Ibid, pp 17–19

137. Document A33, p 4

waterway, according to the *ad medium filum aquae* rule of English common law. At common law, ownership of a riverbed carries with it other rights, including those of fishing and navigation. Because the Crown's ownership is regarded as being for the public benefit, the common law recognises public rights of fishing and navigation in rivers whose beds are owned by the Crown. But these rights do not obtain where riverbeds are privately owned.<sup>138</sup>

In sum, when the Crown confiscated the lands of Tauranga Māori, it also took waterways. Even when portions of these lands were returned to Tauranga Māori, they were no longer held under customary title but under Crown grant. Thus, the nature and extent of Māori property rights were now very different. Instead of collectively possessing a river, wholly and indivisibly, as a taonga of the people, individual riparian owners now possessed the river's banks and bed to the water's midline, and controlled the right to fish. And, if and where they no longer owned the adjacent banks, Māori lost legal ownership of even their riverbeds, and with them, their rights of fishing and navigation.

In asserting ownership over key environments such as foreshores, harbour and inshore seabeds, and navigable waterways, the Crown did not consult with Māori. Nor did it do so when it imposed English common law over other waterways, thus asserting the power to shape how ownership was to be determined. The consequent loss of ownership over these environments and their resources forced Tauranga Māori to struggle – unsuccessfully – for more than one hundred years, to assert their rights to participate in the control and management of their taonga.

#### 7.4.4 Rangatiratanga through management?

The Crown has played a very active and direct part in the development of Tauranga, particularly in the decades immediately following the Second World War. The claimants argue that the Crown's active management of Tauranga's development ignored Māori rangatiratanga and kaitiakitanga, and subsumed Māori cultural and spiritual values, which placed great importance on protecting a healthy environment. Māori had to accept the Crown's vision of development or they were sidelined, ignored, and forgotten.<sup>139</sup> The Crown agrees that, earlier in the twentieth century, Māori could influence decision-making mainly through provisions that applied to the public in general.<sup>140</sup> They argue such provisions did recognise Māori cultural associations, at times, but acknowledge that there has subsequently been 'an incremental recognition of the need to provide for Māori values in planning' and to provide mechanisms through which Māori can have input into decision making.<sup>141</sup>

138. Graeme Austin, 'Legal Submissions on the Beds of Navigable Rivers, Section 261 of the Coal Mines Act 1979', app 15, Waitangi Tribunal, *The Pouakani Report 1993*, 2nd ed (Wellington: GP Publications, 1996), pp 459–469

139. Document U31, p 16

140. Crown counsel, closing submissions: issue 5, 8 December 2006 (doc U29), p 5

141. Ibid, pp 5–6

## 7.4.4(1)

This acknowledgement, though limited, is helpful. The Crown has conceded, albeit obliquely, that Māori interests were not explicitly provided for in general planning legislation until recently, and that Māori had no input into decisions regarding the taonga of the natural environment other than as ordinary members of the public. This is not the partnership envisaged by the Treaty, and it in no way provided for Māori rangatiratanga or kaitiakitanga in environmental management. We therefore do not conduct a full review of the legislative regime that provided the framework for environmental management before 1991. Instead, we look at how and where provision (or, more often, lack of provision) for Māori rangatiratanga and kaitiakitanga in general legislation had specific impacts in Tauranga – one such example being in the development of the harbour and port infrastructure. In doing so, we acknowledge that aspects of the Crown's legislative regime did explicitly attempt to protect the environment (and thus came close to mirroring Māori cultural values). And the Crown did at times intervene to restrain development in Tauranga Moana, in the interests of conserving indigenous ecosystems (albeit only in locations where agricultural production was not seen as economically viable). To Tauranga Māori, however, these interventions have only highlighted the Crown's general unwillingness to provide for them to exercise rangatiratanga and kaitiakitanga and to continue accessing traditional resources.

The Crown has acquired large areas of Māori land in Tauranga for the purposes of water catchment protection, scenery preservation, and environmental conservation. In chapter 4 we discussed the acquisition of the Ōtawa scenic reserve (see sec 4.2.2); in chapter 8 we will instance cases of the many reserves around the harbour formed from Māori ancestral land. Here, we discuss the Crown's attempts to acquire offshore islands such as Kārewa and Tūhūa in the name of environmental conservation.

(1) *Kārewa*

In 1917, the Crown compulsorily acquired those portions of Kārewa Island which the Māori proprietors had refused to sell, using the provisions of the Public Works Act 1908 and the Animal Protection Act 1914. It did so primarily to protect a tuatara population threatened by Europeans, who collected the animals as natural curiosities for their gardens. Though the Crown paid the owners £10 15s 8d in compensation for the loss of land, it acted without consultation, thus ignoring ongoing Māori interests in maintaining their harvests of tītī (muttonbirds), taonui (black petrels), and kaimoana.<sup>142</sup> Despite the island being declared a sanctuary from which 'no imported or native game was to be taken or killed', however, Māori continued to harvest these resources until the island was set aside as a wildlife sanctuary in 1972.<sup>143</sup> Māori can no longer visit the island and, on at least one occasion, people

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142. Document A18, pp 404–405

143. Kihi Ngatai, amended statement of claim, 11 December 1995 (doc A77, app 2, p 108); Te Hau Tutua, brief of evidence, undated (doc R67), para 27

have been prosecuted for attempting to exercise their traditional harvesting rights (as has also occurred over the taking of *kererū*).<sup>144</sup>

## (2) *Tūhua*

The Crown also sought to gain control over *Tūhua* (Mayor Island) to conserve its flora and fauna, although the outcome was somewhat different. The Crown made many attempts to buy the island from Te Whānau a Tauwhao between the late nineteenth and mid-twentieth centuries.<sup>145</sup> It was encouraged in this aim by various conservation and recreational groups (notably the Tauranga Deep Seafishing Club). But consistent opposition from the majority of owners prevented the Crown from acquiring more than a few shares in the island in the late nineteenth century.<sup>146</sup> As a petition from Te Whānau a Tauwhao in 1895 makes clear, the owners had very particular reasons for insisting *Tūhua* remained in their hands:

this Island should be left alone for us and our descendents it being a very sacred burying place, over 10,000 dead are buried there, some are resting in caves in the rocks and others are scattered all over the island, a very little vacant space is unused.<sup>147</sup>

Although the Crown had the power to take the island under the Public Works Act, to its credit, it refused to do so and continued to seek a negotiated purchase.

The Crown nevertheless operated under the paternalistic assumption that it was solely the job of the Crown to protect the island's plants and birdlife, as well as the historical association of Māori with the island – a view clearly expressed by the acting Minister of Native Affairs, Frank Langston, in 1937, when he said: 'The Natives themselves cannot take care of the island'.<sup>148</sup> The assumption that the Māori owners could not, *on their own*, protect their property and care for the island's rare flora and fauna may well have been correct, given the intense interest in the island from a range of different lobby groups. However, instead of working to assist its owners, the Crown proceeded to use legislation to restrict use of the island, without consultation.

In 1913, *Tūhua* was declared a sanctuary for imported and native game under the Animals Protection Act 1908.<sup>149</sup> The Māori owners of *Tūhua* remained completely unaware of this development until 1946,<sup>150</sup> when members of the Katikati Tribal Executive made clear the owners' position regarding attempts to usurp control over their island, whether in the name of conservation or commercial development:

144. Document Q5, pp 6–7

145. Suzanne Woodley, *Tuhua (Mayor Island)*, Waitangi Tribunal Research Series, 1993, no 8 (doc A7), pp 8–27

146. Ibid, pp 8–9, 13–19, 23–24

147. Cited in Richard Boast, 'Confiscation and Regrant: Matakana, Rangiwaia, Motiti and Tuhua: Raupatu and Related Issues' (commissioned research report, Wellington: Waitangi Tribunal, 2000) (doc J1), p 58

148. Department of Internal Affairs to Native Department, 16 November 1937, AAMK 869/203a, 7/6/30, ArchivesNZ, Wellington (doc A7, pp 19–20)

149. Document A7, pp 8–11

150. Ibid, pp 11–12

Whilst we are only too pleased to cooperate with the acclimatization society, sword fishers, holiday makers etc, at the same time we wish to make it clear that we are the owners of the island which is entirely under the control of the Maori owners and we must be consulted and our permission given before anything is done by any person or body which may effect [*sic*] the island.<sup>151</sup>

Despite the Crown's disquiet, the Māori owners have successfully maintained overall authority and control over Tūhua by vesting the island in a trust, formally established in 1951. The Crown is represented on the trust's board by three Government departments (Māori Affairs, Internal Affairs, and Lands and Survey).<sup>152</sup> The trust is charged with managing most of the island as though it were a national park, although smaller portions may be developed for commercial ventures, or managed for protection of historic and tribal sites.<sup>153</sup>

In 2002, Tūhua assumed a unique status as the first island to become a Māori conservation area, under a Ngā Whenua Rāhui kawenata (covenant).<sup>154</sup> The ocean surrounding the northern end of Tūhua is also a Department of Conservation marine reserve. Tūhua is thus a rare example of Māori retaining ownership and control over their land while satisfying the Crown that conservation values are being protected.<sup>155</sup> It bridges the divide often perceived between Māori and Pākehā over the purpose of conservation, as expressed to us by Whareoteriri Rahiri of Waitaha:

DOC has an overriding statement that talks about conserving the flora and fauna for future generations. They never discuss future use. However, from a tangata whenua perspective you conserve these resources until they get to abundance and then you use the overabundance until it is consumed to a sustainable level . . . DOC places it in a glass bowl. You look at it but don't have a relationship with it.<sup>156</sup>

Most importantly, Tūhua provides a rare historical example of successful resistance to Crown attempts to purchase Māori land, and an equally rare example, even in recent times, of politically and ecologically sustainable co-management of resources by Tauranga Māori and the Crown. Despite the Crown's doubts and persistent attempts to wrest ownership and control from Tūhua's owners, the latter have determinedly retained control over their taonga, and they have not over-exploited resources, though they may not have been able to wholly prevent the depredations of others. The history of Tūhua Island, still home

151. Rawiri Faulkner and T Roretana for Katikati Tribal Executive to Constable Hodge of Tauranga, 17 August 1946, AAMK 869/203a, 7/6/30, ArchivesNZ, Wellington (doc A7, p 25)

152. Ibid, pp 28–29

153. Ibid, pp 29

154. Chris Carter, 'Tuhua (Mayor) Island Protected As Maori Reserve', Beehive.govt.nz, <http://www.beehive.govt.nz/release/tuhua+mayor+island+protected+maori+reserve> (accessed 1 September 2009)

155. We note that on 4 May 2007, the 16 shares in Tūhua that had been acquired decades earlier by the Crown were finally re-vested in the Māori owners (Tauranga minute book 89, fol 224).

156. Whareoteriri Rahiri, brief of evidence, 27 September 2006 (doc s35), p 11

to a diverse (and growing) range of wildlife, shows what might have occurred elsewhere in Tauranga Moana, if Māori had been assisted to exercise their authority to protect their cultural values and spiritual associations with their environment. In the next sections, we examine what has occurred instead.

### 7.5 ENVIRONMENTAL MANAGEMENT AND MODIFICATION, 1886–1991

Since 1886, the natural landscape of the Tauranga area has undergone enormous change. In the early 1900s, Tauranga itself was a small village. Even in 1945, its urban population numbered less than 10,000 and the entire region had only some 18,000 inhabitants.<sup>157</sup> Now a city of 100,000 people, Tauranga is one of the fastest growing urban areas in Aotearoa. In the process of this rapid development of the city and its region, forests have been felled, pastures sown, rivers dammed, land reclaimed, and a port created. The rate of expansion increased dramatically after the Second World War, particularly once the decision was made in 1950 to construct overseas port facilities at Mount Maunganui.

The development of the city and the region has profoundly affected Tauranga Māori. As Evelyn Stokes observes, ‘in few areas have the pressures on land been so intense and involved such complete transformation of the lifestyle of Maori communities in a single generation.’<sup>158</sup> In the face of these tumultuous developments, Tauranga Māori have struggled to control the fate of their ancestral landscapes. They also perceive their inability to act as kaitiaki in their rohe as affecting their mana. As Heeni Murray put it to us:

The bounty of the ocean was one of our main baskets of food. Over the years, for many reasons, these baskets cannot now be filled. Again it all comes back to our mana over ourselves and our resources. This was guaranteed to us by the Treaty. We can remember when we could walk down to the sea to spear flounder for breakfast. However, today this is not the case.<sup>159</sup>

This acute sense of dispossession and loss is why Desmond Heke Kaiawha titled his summary of the impacts of development in Tauranga ‘environmental raupatu’.<sup>160</sup> Very many tangata whenua witnesses echoed this theme, and asked that we find the Crown guilty of failing to prevent the loss, pollution, and degradation of resources. Te Awanuiarangi Black told us, ‘We are the kaitiaki of this place, of its mauri and had this been recognised properly

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157. Stokes, *A History of Tauranga County*, pp 288, 328

158. Evelyn Stokes, *Tauranga Moana: The Impact of Urban Growth* (Hamilton: Centre for Māori Studies and Research, University of Waikato, 1980) (doc A15), p 2

159. Document J22, p 10

160. Document R34, p 5



we could have stopped this depletion.’<sup>161</sup> However, as Heeni Murray noted, problems such as over-fishing, as with environmental damage generally, have occurred ‘for many reasons’.<sup>162</sup>

In this section we discuss the roles played by Crown and Māori in managing and modifying the environment. We do so to assess the Crown’s environmental management performance against the principles of the Treaty. Our discussion focuses on the twin issues consistently raised by the claimants: their inability to exercise any authority over their ancestral landscape, and the blame they attach to the Crown for allowing the destruction, pollution, and depletion of their ancestral landscape to occur.

This section surveys the years from 1886 until 1991, when the enactment of the Resource Management Act 1991 established the modern management regime. We are mindful that this is a very long period over which to assess the Crown’s behaviour. Knowledge about the causes of environmental change, and people’s perceptions of environmental issues, have altered greatly over this time. The *Mohaka ki Ahuriri Report* acknowledged that while the Crown, for economic reasons, long encouraged practices that were undoubtedly environmentally destructive, ‘it would be wrong to judge Crown actions or omissions by the standards expected in environmental management in the twenty-first century’.<sup>163</sup> However, some concerns over environmental degradation in Tauranga Moana were expressed even in the early twentieth century and, very often, Māori were the source of such concerns. In particular, Māori repugnance towards the pollution of waterways, and to over-fishing, does not seem to have changed greatly over time. When assessing historical environmental management practices, the critical questions therefore become: given the general state of knowledge, and the known attitudes of Māori, how did Crown actions (or omissions) help or hinder the ability of Tauranga Māori to exercise rangatiratanga and kaitiakitanga in the management of their remaining natural environment and ancestral landscape?

#### 7.5.1 Losing the resources of the land

Tauranga’s first Pākehā settlers were determined to make farms from the forests and wetlands that had sustained the traditional Māori culture and economy. As elsewhere in New Zealand, it was thought that the indigenous forest and wetland species would provide (at best) a single standing crop, before being laid down in crops or grass. Māori, by contrast, had long regarded these ecosystems as providing a sustainable and ongoing pātaka, or storehouse, of foods, though they too now sought to convert more of their lands to agricultural production. Crown policy, however, was that the natural resources of New Zealand ‘existed to be developed and the land made fit for occupation’.<sup>164</sup>

161. Document R45, p 13

162. Document J22, p 10

163. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, p 636

164. M M Roche, *Forest Policy in New Zealand: An Historical Geography 1840–1919* (Palmerston North: Dunmore Press, 1987), p 23



**(1) Forests**

The milling of the forests of Tauranga Moana began in 1884.<sup>165</sup> The initial focus was the kauri forests behind Katikati which, as a result, were effectively cut out by the 1920s.<sup>166</sup> As throughout New Zealand, much valuable timber was simply burnt in the haste to bring land into production. In September 1898, the *Bay of Plenty Times* complained of:

The extraordinary neglect of the timber industry in this portion of the Bay of Plenty where such splendid timbers as rimu, mangeao, tanekahi etc, are plentiful . . . People will still burn bush, the timber of which should yield a profit of £20 or £30 per acre, to form a cattle run which will not return as much in 20 years<sup>167</sup>

Native forest was felled in the Kaimai Range throughout the early and mid-twentieth century and, in the 1940s, 10 mills were still operating. Clear-felling was halted in the 1970s, however, partly in reaction to growing concern over loss of indigenous forest, but primarily because of public and official alarm at increasing evidence of erosion (in which growing numbers of feral goats were also a factor).<sup>168</sup> Neil Hansen, county engineer, reported in 1968 that while there had been no slips in the area 20 years previously, they were now a serious and spreading problem. The *New Zealand Herald* reported his warnings:

If nothing is done – and done urgently – these slips will continue to get worse and additional slips will occur’ he said. ‘Our river beds will aggregate and cause flooding in the lower country. Runoff will increase and, in the ultimate, we will lose a considerable amount of our water resources in this catchment.<sup>169</sup>

Such concerns spurred the Forest Service to develop a management plan for the Kaimai Range. It sought to balance the retention of native forest for catchment protection with amenity and scientific values, while still allowing for increasing pine plantations. Growing public pressure for the establishment of a national park in the Kaimai Range forced a greater focus on environmental protection of amenity and ecological values. This resulted in the Government creating the 37,000 hectare Kaimai-Mamaku State Forest Park in 1975.<sup>170</sup> Even within this area, around a third of the native forest had already been destroyed by the time the park was created.<sup>171</sup>

Many tangata whenua witnesses mourned the destruction of native forests in the Kaimai Range. Some also disapproved of their replacement with pine. Gloria Koia, for example,

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<sup>165</sup> Stokes, *A History of Tauranga County*, p 269

<sup>166</sup> Document D7, p 47; Stokes, *A History of Tauranga County*, pp 270–275

<sup>167</sup> Stokes, *A History of Tauranga County*, p 270

<sup>168</sup> Document A11, pp 29, 33

<sup>169</sup> Stokes, *A History of Tauranga County*, p 426

<sup>170</sup> Document A11, pp 35–36

<sup>171</sup> Department of Conservation, ‘Kaimai-Mamaku Forest – A Haven of History’ (Christchurch: Department of Conservation, 2006)

7.5.1(1)

TAURANGA MOANA, 1886–2006



Figure 7.3: Early logging in the Kaimai Range (undated)

Photographer unknown. Reproduced courtesy of Tauranga Heritage Collection (dr 7, fld 2, no 74).



Figure 7.4: Logging truck at Poripori (Lower Kaimai), circa 1962

Photographer unknown. Reproduced courtesy of Tauranga City Libraries (03-032).

blamed pine plantations for a loss of biodiversity: ‘we have lost bird life in the Kaimai. Even the insects have disappeared and the frogs have gone. For these creatures their natural food chain has been disrupted.’<sup>172</sup> That said, some Tauranga Māori have themselves engaged in exotic forestry – through the Ngā Manawa Incorporation, for example. Such land uses have been inevitable if rates are to be paid and ownership retained on otherwise unproductive land, and the industry has also provided job opportunities that might not otherwise have been available.<sup>173</sup>

## (2) Lowlands

While the rugged topography of the Kaimai Range and a growing appreciation of its scenic qualities among Europeans protected some of their indigenous ecosystems, the indigenous forest and wetland ecosystems of the coastal lowlands have been almost completely transformed.

Historically, European settlers largely ignored the potential of the indigenous resources of the swampy lowlands of New Zealand. They persistently saw ‘swamps’ and ‘mudflats’ as

172. Wendy Hart, ‘A Comparative Study of Public Works Takings in the Tauranga Moana Inquiry District’ (commissioned research report, Wellington: Waitangi Tribunal, 2006) (doc s2), p 46; Gordon Te Reo Hau Ranui, brief of evidence, 22 May 2006 (doc Q7), p 7

173. Document A11, pp 121–123, 129

simply impediments to agricultural production. Only flax was seen as potentially useful, and although attempts to develop flax-milling enterprises on the Tauranga lowlands began in the late 1880s, they were sporadic and generally short-lived. Evelyn Stokes notes that ‘there was no attempt to control cutting or maintain the swamps.’<sup>174</sup> A 1924 article in the *Bay of Plenty Times* complained that flax was ‘not being conserved or protected’, and commented that ‘the flax bearing lands are gradually being brought in for farming purposes.’<sup>175</sup>

The Marine Department did seek to avoid reclaiming wetlands around Tauranga Moana, in order to maintain tidal flows and thereby prevent silting up the harbour entrance. At times, Māori interests were also taken into account by the Marine Department: one of its reasons for declining permission to reclaim the Te Rereatukahia Estuary in the 1930s, for example, was its use as an important flounder fishery for Māori.<sup>176</sup> Nevertheless, the trend for draining and reclaiming wetlands continued around Tauranga throughout the early and mid-twentieth century.<sup>177</sup>

The estuary margins of Waimapu and Waikareao were particularly affected by reclamation for the railway line. Between 1912 and 1933, almost 1200 acres of the Judea wetland at the mouth of the Kōpūrereroa River at Waikareao were drained by the Judea Drainage Board, constituted under its own legislation.<sup>178</sup> The Judea wetland, or ‘Judea swamp’ as it was to European settlers, contained an urupā, several puna (springs) and a hōpua (tidal pool) used for baptisms; it was also a source of food, harakeke, and raupō for Ngāi Tamarāwaho of Ngāti Ranginui. Fisher et al argue that ‘there was no genuine consideration given to their very real interest in the preservation of a significant spiritual, cultural and sacred resource.’<sup>179</sup> The extent of such an interest is suggested by the fact that when, in 1934, the Government compulsorily acquired the only substantial wetlands of Ngāi Tūkairangi and Ngāti Kāhu to build the airport at Whareroa, the tangata whenua took their case as far as the Privy Council. They were unsuccessful. These wetlands were a major source of food and the principal source of fuel for these hapū, who lacked electricity and so relied heavily on open fires.<sup>180</sup>

It is clear that even at this early stage in Tauranga’s development, Tauranga hapū valued some of their most productive wetlands highly, desired to retain them, and struggled against their ongoing destruction. Wetland drainage and reclamation continued through the 1950s and 1960s, much of it conducted by the Department of Lands and Survey.<sup>181</sup> Whareoteriri Rahiri of Waitaha, told us of trips to the Wairākei Stream and its outfall into the estuary to

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174. Stokes, *A History of Tauranga County*, p 269

175. Quoted in Stokes, *A History of Tauranga County*, pp 249–250, 269

176. Document D7, p 90

177. Ibid, pp 54–56

178. Ibid, p 54

179. Document A50, p 40

180. Ibid, pp 43–44

181. Stokes, *A History of Tauranga County*, pp 394–395





Figure 7.5: Judea (Hūria) circa 1925. Waikareao Estuary and the Te Papa Peninsula in the background.

Photographer unknown. Reproduced courtesy of Tauranga City Libraries (04-645).

gather watercress and pipi. He remarked on the clarity and cleanliness of that stream. As Boffa Miskell has reported:

As late as the 1950s this raupo-fringed lagoon was still an isolated place little known to local Pakeha, a place where local whanau could still gather to gather tuatua and pipi, or catch kahawai at the mouth of the lagoon. Upstream from the lagoon, fishing parties would gather watercress on their homeward journey. Since then, drainage works and residential development have obliterated the lagoon, the stream, and most signs of the former Maori occupation and use of the area.<sup>182</sup>

Similarly, Te Inaiti Tamihana of Waitaha recalled gathering food and flax in streams and rivers such as the Waiari, Raparapaahoe, Kopuaroa, and Kirikiri, which he recalled:

were still in their original condition when I left here in 1954. They were beautiful and had those lazy curves and currents flowing down to the sea. That has all changed now and most of the rivers around here have been decimated . . .<sup>183</sup>

As Geoff Park has stressed, New Zealand's development is remarkable for the fact that 85 per cent of its wetlands have been drained in little more than a century.<sup>184</sup> In the Bay

182. Boffa Miskell, 'Cultural and Archaeological Assessment: Papamoa Hills Cultural Heritage Regional Park (Te Rae a Papamoa)', p 20 (doc s35, pp 9-10)

183. Te Inaiti Tamihana, brief of evidence, undated (doc L11), pp 6-7

184. Geoff Park, 'Swamps which might doubtless easily be drained': Swamp Drainage and Its Impact on the Indigenous, in *Environmental Histories of New Zealand*, edited by Brooking and Pawson, p 151

## TAURANGA MOANA, 1886–2006

## 7.5.1(3)

of Plenty, indeed, less than one per cent of the natural wetland area remains.<sup>185</sup> In total, Environment Bay of Plenty estimates that some 1000 hectares of wetland have been drained and reclaimed in the Tauranga Harbour area alone.<sup>186</sup> Neither the Crown nor European settlers took account of Māori views of these ecosystems until they had almost entirely disappeared.<sup>187</sup>

The destruction of these ecosystems has left Tauranga Māori with very few sites from which to harvest their traditional cultural resources. Access to these few sites is often problematic. Te Karehana Wicks, spokesperson on environmental issues for Ngāi Tahuwhao ki Otāwhiwhi, noted that development had destroyed or closed access to all but one raupō spring from which her hapū formerly collected dyes and raupō. Now, they have insufficient resources to maintain customary practices, and are forced to use nylon in their tuku-tuku panels. Access to their traditional sites for harakeke and watercress was barred by the Western Bay of Plenty District Council, because of proximity to the airport.<sup>188</sup>

In sum, during the period under review, Tauranga's experience mirrored that of New Zealand as a whole. As landscapes were converted to European-style economic activity, forests and wetlands were cleared to make way for a much smaller range of animals and plants.<sup>189</sup>

**(3) Conclusions**

As the Crown erected a legislative and policy framework to enable Tauranga's development, Tauranga Māori lost authority and control over their former lands and resources. Tauranga's development involved the extensive clearance of native forest (both for timber and for farming) which 'created a landscape of wasteful timber cutting, fire, flooding and deforestation'.<sup>190</sup> That and the draining of wetlands had a dramatic environmental impact: indigenous biodiversity was lost, the supply of traditional resources such as flax and raupō diminished, and (as we will see in the next sections) waterways and the harbour silted up or became polluted.<sup>191</sup>

**7.5.2 Losing Tauranga Moana**

Claimants raised several issues relating to the Crown assuming control of the harbour, the transfer of that control to the Harbour Board, and the subsequent development and

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185. Geoff Park, *Effective Exclusion?: An Exploratory Overview of Crown Actions and Maori Responses Concerning the Indigenous Flora and Fauna, 1912–1983* (Wellington: Waitangi Tribunal, 2001), p 82

186. Paul Malcolm Dell, brief of evidence, 27 September 2006 (doc T3), p 23

187. Park, "Swamps which might doubtless easily be drained", p 164

188. Document R25, pp 4–5

189. Pond, *The Land with All Woods and Waters*, p 12

190. Ibid, p 42

191. Ibid; Document D7, p 47

management of the harbour as a port. They allege that, as a result of their loss of ranga-tiratanga, and exclusion from harbour management, the Crown was able to ignore their cultural and spiritual relationship with the harbour in the drive to develop an international deep-water port. The Crown then failed to protect Māori resources and their sites of significance from the effects of port development, which also restricted access to those places. To assess these claims, we review the development of the port since the early twentieth century, and its impact on both Tauranga Moana and tangata whenua.

#### (1) *Port development, 1915–50*

From its establishment in 1912, the Tauranga Harbour Board was animated by a ‘spirit of progressive development’, with ‘economic expansion’ the prevailing philosophy. The expansionist vision found its fullest expression in the 1950s and 1960s, but it was already evident much earlier.<sup>192</sup> In a 1939 speech, the chairman of the Tauranga Harbour Board described his hopes for the Waikareao Estuary, for example, and what the landscape might become:

[L]et us picture this place [Waikareao] deepened by digging, dredging or pumping out the sand from portions of it, to maintain the tidal flow or to improve it, and with the spoil reclaim the outer portions to form parks, playgrounds, drives, etc., round salt water bathing pools, Childrens [*sic*] pools, sailing and rowing lakes, which would be cleaned out twice daily by nature's tides; surrounded by high grounds, covered with beautiful residences and gardens, we would have a domain unsurpassed anywhere . . . we should have an elaborate and comprehensive scheme for Waikareao drawn up . . .<sup>193</sup>

This official vision of an area that had otherwise been known as the Judea wetlands – a significant ‘spiritual, cultural, and sacred resource’ of Ngāi Tamarāwaho – took no account of the views of local Māori.<sup>194</sup>

From 1915, there was a burst of activity around the harbour. Dredging was carried out, and ‘training walls’ and deflectors (to modify water flow) were built, based on the advice of a private engineer and approved by the Marine Department and its Minister.<sup>195</sup> At first, the Government was actively involved, but withdrew when it became clear that dredging was a ‘waste of time’ – the channel filled with silt as fast as it was cleared.<sup>196</sup> The harbour board took over, and in 1923, the Stellar Channel was dredged and the Cutter Channel deepened.<sup>197</sup>

After this initial phase of activity, harbour developments slowed and became less coordinated. In 1925, the harbour board received government approval for a new concrete wharf

192. Document A36, p 27

193. *Bay of Plenty Times*, 18 October 1939 (doc D7, p 68)

194. Document A50, pp 40–41

195. Document D7, pp 55–56

196. *Ibid*, p 55

197. Document R3, p 12



to replace the Mount Maunganui railway wharf that had fallen into disrepair.<sup>198</sup> In 1927, a commission of inquiry into the Mount Maunganui to Te Maunga railway line was established. It recommended that a deep-water port be established at Mount Maunganui, but the idea was not taken any further at the time.<sup>199</sup> Although all the Bay of Plenty local authorities gave evidence to the inquiry, Māori were not represented.

Over this period, there were several small reclamations at Sulphur Point. From 1928, with verbal approval from the harbour board, mill waste was dumped on the foreshore, then bulldozed out and levelled. From the 1940s, local factories used the mudflats as a dumping ground, allowing sawdust and trade waste to float out into the harbour itself. This situation continued until the 1970s.

### **(2) Port development in the mid-twentieth century**

The drive to develop a deep-water international port within Tauranga Harbour gathered momentum in the mid-twentieth century as the region's economy boomed, especially the forestry industry. The Crown had first expressed interest in a deep-water port in 1925, to support a potential pulp and paper industry.<sup>200</sup> In the 1940s, as exotic forests matured, this interest became pressing.<sup>201</sup> The Forest Service assessed milling in the region, while the Ministry of Works investigated the rail, airport, and housing developments needed to support a major export port.<sup>202</sup> The Ministry of Works favoured Mount Maunganui as the location. A late bid from the Whakatāne Harbour Board in 1949 prompted an inquiry in 1950, but Tauranga Harbour's physical advantages and the likelihood of considerable construction and maintenance savings were overwhelming. Indeed, the 1950 inquiry committee considered that the 'development of the port by reasonable stages should be within the financial resources of the Tauranga Harbour Board.'<sup>203</sup>

The actual development of the port was extraordinarily rapid. In April 1951, the Tauranga Harbour Board met with the Ministers of Works, Railways, Lands, State Forests, Māori Affairs, and Internal Affairs, and in June that year, Cabinet approved the development of a deep-water port at Mount Maunganui.<sup>204</sup> It was agreed that the Government would design and construct the port, and hand it over to the Tauranga Harbour Board after initial development was completed. An officials' committee called for the work to be declared in the national interest so construction could be accelerated.<sup>205</sup>

198. Document D7, p 62

199. Ibid, p 63

200. Michael Roche, *History of New Zealand Forestry* (Wellington: GP Publications, 1990), pp 290–291

201. Document D7, p 63

202. Document A36, p 42

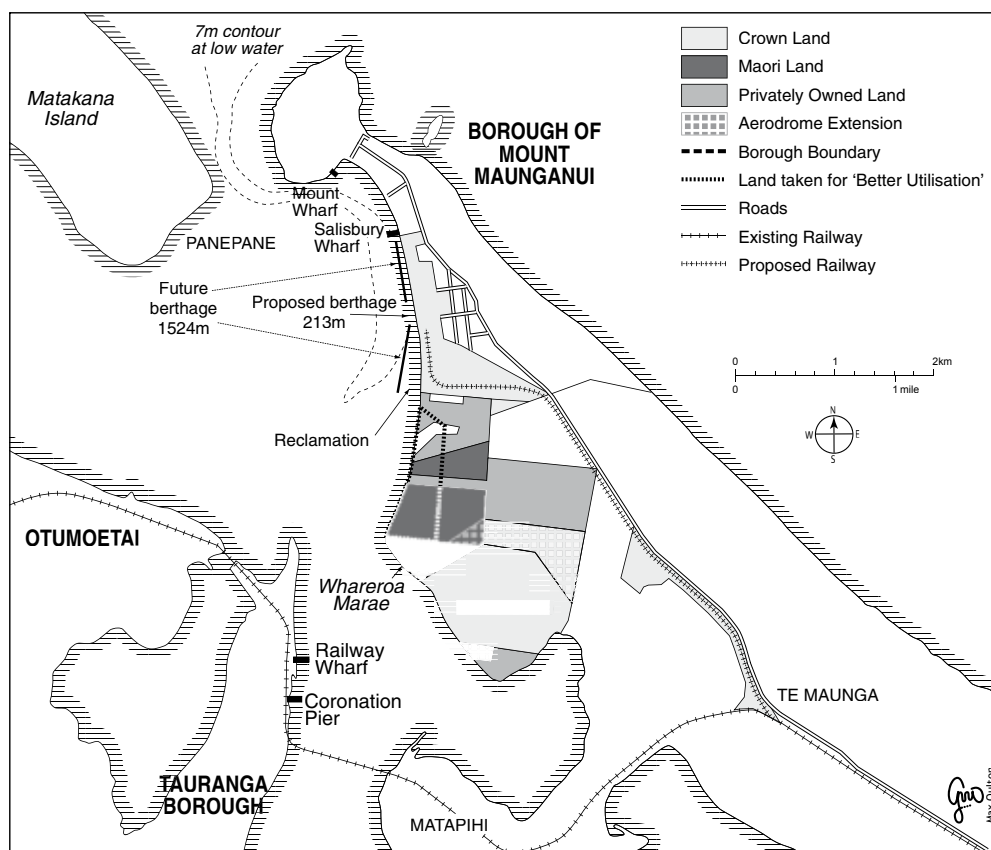
203. Ibid, pp 42–45; Stokes, *A History of Tauranga County*, pp 353–357

204. Leanne Boulton, 'Town and Country Planning and Its Impact on Tauranga Maori Communities, c1953–1990: A Summary and Analysis of the Existing Research' (commissioned research report, Wellington: Waitangi Tribunal, 2006) (doc s6), pp 87–88

205. Document D7, p 64

## THE ANCESTRAL LANDSCAPE

7.5.2(2)



Map 7.3: Port of Tauranga, 1950

According to Giselle Byrnes, there is no evidence of Māori involvement in the decision to develop the port, nor of any consideration being given to Māori needs or values. Interest was, however, shown in the land owned by Māori in the proposed port area. When the Department of Māori Affairs was invited to give evidence to the 1950 inquiry committee about 'Maori interests' in the area, the invitation was passed on to the Waiariki District Māori Land Board which owned land near the aerodrome – suggesting that the department was aware the inquiry's prime interest was in land acquisition. In the event, neither the department nor the land board attended, and the inquiry's report made no mention of Māori interests or the environmental effects of the development. The department did give advice to the officials' committee, but made no mention of Māori interests in the harbour or foreshore.<sup>206</sup> Its advice was confined to Māori landholdings in the port area (where, as discussed in the public works chapter, the Crown took substantial Māori land for 'better utilisation'). Likewise, when local authorities met to discuss the development of a deep-water

<sup>206</sup> Ibid, pp 63–64

port, there was no representation of Māori and no evidence of Māori values and interests being considered.<sup>207</sup>

Tauranga Harbour Board was able to finance the port's development thanks to a series of loan and empowering Acts. Eight were passed between 1956 and 1968,<sup>208</sup> through which the Crown approved not just the loans themselves but also significant details of the development: lease agreements, specific reclamation areas, and the like.<sup>209</sup> Byrnes describes Māori values and aspirations as 'completely absent' from parliamentary debate when these Acts were passed, and says Māori interests or concerns were '[n]owhere' in the resulting legislation.<sup>210</sup>

The development of the port had several components: the construction of the Mount Maunganui deep-water wharf, the construction of the Sulphur Point container terminal, the dredging of shipping channels, and the harbour bridge. We look briefly at each of these in turn.

### (3) *The Mount Maunganui deep-water wharf*

The construction of 1225 feet of berthage (around 373 metres) at Mount Maunganui began in 1953.<sup>211</sup> In addition to building wharves, it involved extensive channel deepening, the reclamation of 4.8 hectares of harbour bed behind rock retaining walls, and the construction of storage and rail facilities. A further 300 acres of land (121.4 hectares) were to be held for the development of port services and for the regional industries whose growth was expected to be stimulated by the new port.<sup>212</sup> Construction of the first stage was undertaken by the Ministry of Works.

Once the first stage opened in December 1955,<sup>213</sup> the harbour board set about raising money for improvements through the loan and empowering Acts noted above. Between 1956 and 1968, the deep-water and railway wharves were extended, more dredging was undertaken, berthage for fishing vessels and tankers was constructed, and port infrastructure developed (cool stores, cranes, a weighbridge, and more). Harbour channels were realigned, or deepened, or both – including, claimant witness Anthony Fisher told us, the blasting of Pane Pane Reef (an important source of kaimoana for Tauranga Māori) to widen the harbour mouth between Mauao and Matakana.<sup>214</sup> The Acts also authorised the reclamation of some 245 acres (almost 100 hectares) of land at points around the harbour for

207. Ibid, p 63; doc A36, pp 43, 45

208. These acts were all entitled 'Tauranga Harbour Board Loan and Empowering Act', differentiated by the year in which they were passed, namely in 1956, 1959, 1962, 1964, 1965, 1966, 1967, and 1968.

209. Document A36, pp 30–31, 33

210. Ibid, pp 28, 31

211. Stokes, *A History of Tauranga County*, p 359; doc s6, p 88

212. Document R3, p 13; doc s6, p 88

213. Document s6, p 88; doc R3, p 13

214. Document R3, p 14

various purposes; by 1971, 71 acres (around 29 hectares) had been reclaimed for the Mount Maunganui port alone.<sup>215</sup>

In 1965, the Crown relinquished control of the port to the Tauranga Harbour Board.<sup>216</sup> By then, as the member for Tauranga proudly proclaimed to the House on several occasions, Mount Maunganui was one of the busiest ports in New Zealand.<sup>217</sup>

#### (4) Sulphur Point development

The next round of major harbour works, starting in 1968, focused on Sulphur Point. The decision to reclaim land here was crucial; it created the twin port structure (Sulphur Point and Mount Maunganui) and dictated transport networks. For example, the construction of both the harbour bridge and the alternative access to Sulphur Point ('Route P') in the 1980s were justified by the need to connect the region to the port at Sulphur Point.<sup>218</sup> Both developments were bitterly opposed by Māori, but they arose out of decisions taken in the 1960s when Māori interests and concerns were given little consideration by the Crown and local authorities.<sup>219</sup>

The development of Sulphur Point involved, first, the construction of a 1524 metre 'training wall' which would increase tidal scour in the shipping channels and prevent them silting up.<sup>220</sup> Next, material dredged up during other harbour works was deposited at Sulphur Point, gradually filling in behind the wall (by 1982, this reclaimed area amounted to an 89-hectare extension to the Point).<sup>221</sup> But the harbour board's plan for the area went much further and included industrial, recreational, and port zones. According to the Sulphur Point Technical Committee, set up by the four local authorities involved, the area's development was 'both feasible and necessary in the interests of the local, regional, and national economy'.<sup>222</sup> Moreover, the harbour board was advised that 'this major man-made development can be accepted into the existing environment with a relatively minor degree of disruption'.<sup>223</sup> Yet a biological survey undertaken when a marina was built at Sulphur Point in 1981 showed the area had a high ecological value for shellfish and was an important roosting habitat for marine birds. This prompted the director of the Wildlife Service to

215. Document D7, p 65; Tauranga Harbour Board Loan and Empowering Act 1964, s 5; Tauranga Harbour Board Loan and Empowering Act 1967, s 4; Tauranga Harbour Board Loan and Empowering Act 1968, s 9 and sch 2; schedules to the various Tauranga Harbour Board Loan and Empowering Acts in the period from 1956 to 1968.

216. Document s6, p 88

217. Document A36, pp 34–35

218. Document D7, p 168

219. Ibid, pp 167–168

220. Document A36, p 47; Stokes, *A History of Tauranga County*, p 368

221. Document A50, pp 49–51; doc R3, p 15; Stokes, *A History of Tauranga County*, p 368; Ian W Hamlin, 'The Port of Tauranga: 1953–1981', in Bellamy (ed), *Tauranga 1882 – 1982*, p 241

222. These were the Tauranga County Council, Mount Maunganui Borough Council, Tauranga City Council, and the Regional Water Board (doc D7, p 60).

223. This advice was given in an environmental impact report prepared for the technical committee: Gabites, Alington, and Edmondson, *Environmental Aspects of the Proposed Development at Sulphur Point*, August 1979 (doc D7, p 60)

7.5.2(4)

TAURANGA MOANA, 1886–2006



Figure 7.6: Sulphur Point, as it was in 1968

Photographer unknown. Reproduced courtesy of Tauranga City Libraries and *Bay of Plenty Times* (04–632).

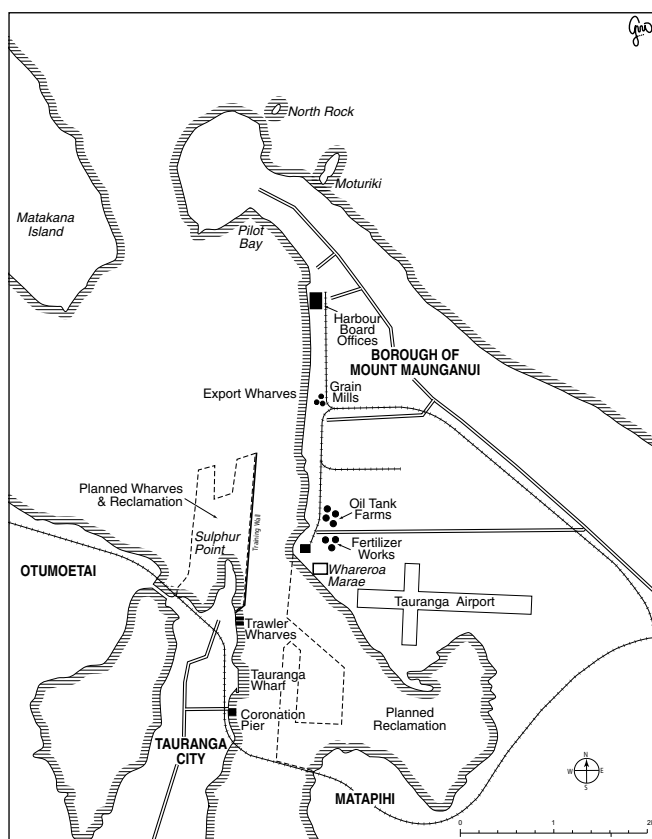


Figure 7.7: Sulphur Point, as it had become by 1976

Photograph by Whites Aviation. Reproduced courtesy of the Whites Aviation Collection, Alexander Turnbull Library (WA-73177).

## THE ANCESTRAL LANDSCAPE

7.5.2(4)



Map 7.4: Port of Tauranga, 1975

object to the marina proposal, arguing that pipi beds extensively used for shellfish gathering would be destroyed (albeit not mentioning Māori). The objection was rejected on the grounds that the pipi beds were probably already polluted.<sup>224</sup>

By 1989, after another round of work, Sulphur Point was New Zealand's largest container terminal; it had 600 metres of wharf, about 35 hectares of cargo handling and storage space (including two hectares under cover), with an additional 20 hectares for future development. The port complex itself comprised approximately 35 hectares of open and 4.5 hectares of covered storage, with additional cargo storage facilities available beyond the port gates.<sup>225</sup>

There is no evidence of consultation with Māori when decisions were made about the development of Sulphur Point. Nor – apart from the Wildlife Service's fears for shellfish gathering – is there any recorded concern for Māori needs or values. This changed in the late 1980s when further reclamation was proposed: the Department of Conservation (which administered the Harbour Act from 1987) required the port company to consult, for the first time, with Tauranga tangata whenua. Ngāi Tamarāwaho firmly opposed any further

224. Document D7, p 60

225. Document A36, p 5



harbour works at Sulphur Point, while the Tauranga Moana Māori Trust Board gave what McClean describes as ‘guarded support’. The Minister of Conservation approved the reclamation, saying that ‘adequate’ consultation had taken place.<sup>226</sup>

Tauranga Māori believe that the reclamation at Sulphur Point has had significant environmental impacts. Hauata Palmer of Matakana Island attributed changes in the upper reaches of the harbour to:

the developments at this end (the Sulphur Point area) of the Harbour. They (the developments) only started getting prominent like when Sulphur Point started to develop. The whole community thinks the same. Sulphur Point is the main thing. The reclamation at Sulphur Point. Then there's the Harbour Bridge, the Wharf development, because that meant dredging the channels. Everything that happens down here affects the upper reaches of the Harbour, the other end.<sup>227</sup>

Claimant evidence indicates that the reclamation also destroyed fishing grounds and mātaitai sites where ‘scallops, tuangi, and kukuroroa were collected, used by Ngai Tuwhiwhia, Ngati Tauaiti, Ngati Tapu, Ngai Tukairangi (all hapu of Ngai Te Rangi), and by Ngai Tamarawaho (a hapu of Ngati Ranginui)’. Other resources affected by the dredging and reclamation work include kina, several varieties of pipi, and snapper, which claimants say have either disappeared or are much diminished in quantity.<sup>228</sup>

#### **(5) *Dredging and the harbour bridge***

Of the many other port developments undertaken, the dredging of the harbour throughout the 1960s and 1970s, and the building of the harbour bridge were of particular concern to claimants.

Dredging enabled larger ships to access the harbour channels. Between 1961 and 1978, port draughts were able to increase from 7.31 metres to 10.67 metres. Large amounts of harbour material were involved: when the Cutter Channel in the inner harbour was realigned in 1967–68, 1.75 million cubic yards (1.34 million cubic metres) of harbour material were removed.<sup>229</sup> The harbour board's freedom to dredge the harbour became more constrained during the 1970s. Before 1974, it required only the approval of the Minister of Marine.<sup>230</sup> But with the passing of the Marine Pollution Act 1974, the board now had to monitor the marine environment and take into account the possible effects of dredging on amenities, marine life, and other uses of the sea.<sup>231</sup> The Act also empowered the Ministry of Agriculture

226. Document D7, pp 60–61; Tauranga Moana Maori Trust Board Act 1981

227. Document A50, p 48

228. Ibid, pp 49–50

229. Document A50, pp 50–51; doc R3, p 15; Hamlin, ‘The Port of Tauranga’, p 241

230. Document D7, p 66

231. Ibid



and Food to monitor dredging.<sup>232</sup> However, the Act did not require the board to consult with Māori, or to consider their use of the harbour and fisheries, and the evidence does not suggest this ever occurred. Unsurprisingly, the process of harbour dredging has destroyed many mātaītai beds.<sup>233</sup>

The push for a harbour bridge – first proposed in 1938, and revived during the 1950s when the deep-water port was being planned – also gained momentum during the 1970s. It was not without its opponents: in the 1950s, the Marine and Public Works Departments had expressed doubts about the effect on the harbour and shipping, although the possible impacts on the local Māori community were not mentioned.<sup>234</sup> By 1972, the Tauranga and Mount Maunganui borough councils, and the harbour board, were all in favour of a bridge. The National Road Board and Ministry of Works were conditionally supportive. Others still had doubts: the Marine Department opposed a low-level bridge, while a high-level bridge was unacceptable to the Ministry of Transport. Nevertheless, in September 1972 the Government passed the Tauranga City Council and Mount Maunganui Borough Council (Tauranga Harbour Bridge) Empowering Act.<sup>235</sup>

Lack of money and wrangling over the bridge's exact location and the approach routes meant construction did not commence until the 1980s. During the approval process, the assistant commissioner for the environment raised the issue of the bridge's potential effect on Māori. He noted that their interests had not been fully taken into account in the environmental impact report, which had been undertaken after almost all the design decisions had been made.<sup>236</sup> Despite these concerns, construction went ahead and the bridge was opened in 1988.

Māori, meanwhile, were vocal in their opposition to the bridge. The Whareroa Marae Committee opposed the passing of the Empowering Act, citing the loss of road access to their marae. Over time, Māori opposition to the bridge grew, focusing on the effects on fisheries and swimming. There were also cultural concerns: tangata whenua pointed to the loss of Te Ruruanga (an important canoe landing for Ngāi Te Rangi and Ngāi Tūkairangi across the harbour from Tauranga) and also the effects on views to Otamataha, resting place of Taiaho Hori Ngatai and Rawiri Puhirake.<sup>237</sup> Believing that the bridge would be built regardless of their opposition, they also objected to the positioning of the eastern accessway to the bridge and a proposed 9904 square metre reclamation for car parking.<sup>238</sup> After discussions between the marae committee and the councils involved, the accessway was relocated, but the reclamation went ahead.

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232. Ibid, pp 66–67

233. Document A50, pp 50–51

234. Document D7, pp 77–79; Stokes, *A History of Tauranga County*, pp 389–391

235. Document D7, p 80; Stokes, *A History of Tauranga County*, p 391

236. Document D7, pp 80–81

237. Counsel for Wai 211 and Wai 668 claimants, closing submissions, undated (doc U12), p 67; doc Q13, pp 13–14

238. Document A50, p 45; doc D7, p 81

TAURANGA MOANA, 1886–2006

7.5.2(6)



Figure 7.8: The approaches to the Tauranga harbour bridge from the Mount Maunganui side, showing the fertiliser works and Whareroa Marae, 1987

Photographer unknown. Reproduced courtesy of Tauranga City Libraries and Bay of Plenty Times (01–488).

Ngāi Tūkairangi and Ngāti Kuku claimants told us that the bridge has affected them in many ways. Tidal flows have changed, contributing to the ongoing loss of kaimoana. Accessing the area has become difficult, while marae activities and ceremonies have been disrupted.<sup>239</sup> The predicted loss of Te Ruruanga and sight lines to Otamataha has occurred. Also affected are hapū living around the Rangataua, Waimapu, and Waipu estuaries, who do not appear to have been consulted at all. They believe that the bridge has increased changes to tidal and channel characteristics, accelerating the depletion and disappearance of mātaitai.<sup>240</sup>

**(6) Other effects of harbour works**

Reclamation has affected more than the harbour itself. Estuaries, rivers, streams, and wetlands at the harbour edge – all areas providing rich and easily accessible food supplies for Tauranga Māori – have been impacted. Some wetlands, waterways, and estuaries have been

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239. Document U12, p 67

240. Document A50, p 46

significantly altered and some completely lost, while adjacent food-gathering areas have been damaged.<sup>241</sup>

We have already noted the draining of the Judea wetland.<sup>242</sup> Other estuaries – Oreanui, Wairoa, Te Puna, Mangawhau, Waipapa, Wainui and Tuapiro, and in particular Waimapu, and Waikareao – were all affected by construction projects such as the Matapihi Railway Bridge, the railway embankment along the foreshore in front of the city, the railway wharf, Tauranga railway station (built on reclaimed land in the Waikareao Estuary), and the Waikareao Estuary bridge.<sup>243</sup> We also heard of the loss of several streams that were both culturally significant and valuable sources of food. Te Awa-o-Tukorako (subject of claim Wai 947 by the Ngāti Kuku hapū of Ngāi Te Rangi) was lost as a result of reclamation for the deep-water wharf. Wairākei Stream (subject of claim Wai 664, by Waitaha) no longer exists, because of reclamation and urban development. In its place is a stormwater drain.<sup>244</sup>

### 7.5.3 Pollution of Tauranga Moana

Pollution, and the associated degradation and depletion of resources, are critical issues for the claimants.<sup>245</sup> We heard universal anger and disgust at the extent of pollution of Tauranga Moana. Angela Marie Merewhiua Bennett of Ngāti Hangarau spoke for all hapū around the harbour when she said:

Pollution has had a devastating effect for us at Hangarau as well as all of the area surrounding the Moana. Rubbish tips created next to tidal flats, sewage outlets around the inner harbour, new subdivisions, development runoff. Runoff from farms into upper streams, then down the rivers to our harbour. The damage done by the collapse of the Ruahihi earth dam into and down the Wairoa River which affected Hangarau because of our closeness to the river, its mouth, and then the harbour surrounding us below.

Here in this time and age then is to me another Raupatu of great magnitude. Our sea-food source is being destroyed. Our kinaki (accompaniment) for the meat and vegetables of the ngahere (bush), as of old, has been taken away, as had the land because of Raupatu.<sup>246</sup>

241. Claims relating to estuaries, rivers, streams and wetlands have been made by Ngāti Ruahine (Wai 362); Ngā Pōtiki (Wai 717); Waitaha (Wai 664); Ngai Tamarawhariua ki Katikati (Wai 42(c)); Ngāti Motai and Ngāti Mahana (Wai 1340/255); Ngāti Kuku (Wai 947/489); Matakana Hapū (Wai 228/266); Ngāi Te Rangi (Wai 540); Te Whānau a Tauwhao ki Ōtāwhiwhi (Wai 938); Ngāti Pūkenga (Wai 751); Marutūahu (Wai 454/812); and Ngāti Hangarau (Wai 503).

242. Document D7, p 54; claim 1.35(a), p 17

243. Document D7, p 53

244. Counsel for Wai 664 claimants, final closing submissions, 12 December 2006 (doc U5(a)), p 56

245. Claims concerning pollution include Wai 362 Ngāti Ruahine; Wai 717 Ngā Pōtiki; Wai 664 Waitaha; Wai 42(c)/522 Ngai Tamarawhariua ki Katikati; Wai 715/854 Ngai Tamawhariua; Wai 211/668 Ngāi Tūkairangi; Wai 947/489 Ngāti Kuku; Wai 227 Ngati Pirirākau; Wai 228/266 Matakana Hapū; Wai 540 Ngāi Te Rangi; Wai 938 Te Whānau a Tauwhao ki Ōtāwhiwhi; and Wai 751 Ngāti Pūkenga

246. Document D17, p 4



Figure 7.9: Bay of Plenty Co-operative Fertiliser Company, Mount Maunganui, 1966

Photographer unknown. Reproduced courtesy of Tauranga City Libraries (99–669).

From some claimants, we also heard concerns about air pollution from industrial and horticultural development. Formerly rural Māori marae and associated communities have become engulfed by development and exposed to a range of pollutants from industry, horticulture, and forestry development. Whareroa Marae, surrounded by heavy industries – including the airport, port, and extensive fertiliser works – is perhaps the worst affected. At our hearings we experienced for ourselves the oppressive noise pollution at Whareroa Marae, directly under the flight path of aircraft using the adjacent airport. We also endured what witnesses rightly described as an ‘at times . . . unbearable’ smell from the Bay of Plenty Fertiliser works.<sup>247</sup> We were told that residue from the fertiliser works continuously accumulates on the windows of the kaumātua flats on Whareroa Marae, which require regular special cleaning by staff from the fertiliser works.<sup>248</sup> The view to Mauao from the marae has also been blocked by industrial development.<sup>249</sup>

247. Document Q14, p 5; doc Q13, p 5; transcript of stage 2, fourth hearing, 30–31 October to 1–3 November 2006 (transcript 4.5), p 13

248. Transcript 4.5, p 13

249. Document Q14, p 5

Elsewhere, horticultural expansion and the widespread use of spraying have been linked to health issues, such as rashes and respiratory diseases.<sup>250</sup> Gloria Koia expressed a viewpoint typical of claimants about the effects of pollution on the mauri of the landscape and the resulting loss of resources:

the essence and value of the rongoa has changed due to fertilising and toxins in the area from the exotic forestry. You can smell it. The environment is polluted and poisoned, dry and dying. The wairua of our bush has been damaged.<sup>251</sup>

However, water pollution was by far the most pressing concern for claimants. Water pollution problems have been evident since the early twentieth century, when rubbish from the tip at Sulphur Point often floated out into the harbour. Agricultural discharges and runoff (from dairying, abattoirs, piggeries, horticulture, and more); industrial activities; urban development in general – all have been ongoing causes of pollution. Raw sewage has been routinely discharged into the harbour. Its margins have been used as illegal dumping grounds for unwanted cars, fridges, washing machines, and more.<sup>252</sup>

In this section we first provide a brief overview of Crown legislation meant to control water pollution prior to 1991, before discussing the extent and the effects of pollution on the waterways and the harbour.

#### **(1) Pollution of rivers and streams**

Problems with water pollution were clearly evident in Tauranga Moana throughout much of the twentieth century, affecting both freshwaters and the harbour, and were a cause of great anxiety to tangata whenua. 'Polluting the river pollutes me because I am the river. We have lost enough', said Lance Waaka, describing to us the pollution of the Waimapu River, once used as a significant food source, for recreation, and for Ringatū baptisms.<sup>253</sup> However, it was not till the middle of the century that the Government began taking steps to address water pollution around the country.<sup>254</sup> Michael Roche attributes this lack of concern to 'the colonial belief in inexhaustible resources and a utilitarian attitude which emphasised the efficient use of water over water quality'.<sup>255</sup> No centralised authority oversaw pollution until the Water Pollution Act 1953 established the Pollution Advisory Council. Initially however the council was restricted to inquiring into, reporting on, and recommending ways of reducing pollution. It gained more teeth with the passing of the 1963 Water Pollution

250. Beverley Anne Perori Flavell, brief of evidence, 18 June 2006 (doc R9), pp 14–15; doc R11, p 6

251. Gloria Koia, brief of evidence, 25 September 2006 (doc S21), p 45

252. Transcript 4.5, p 15; counsel for Wai 227 claimants, closing submissions, undated (doc U16), pp 13–14

253. Document Q5, p 9

254. Michael Roche, *Land and Water: Water and Soil Conservation and Central Government in New Zealand 1941–1988* (Wellington: Historical Branch, Department of Internal Affairs, 1994), pp 28–29, 119–120; doc D7, pp 185–187

255. Roche, *Land and Water*, p 28



Regulations. Now it could classify water and control its use through a zoning scheme similar to that used in district schemes for land use. Waters were graded from SA (suitable for gathering shellfish), through SB (bathing waters), SC (harbour waters), to SD (basic water quality).

The classification scheme was incorporated into the Water and Soil Conservation Act 1967. This was the first truly comprehensive statute controlling water management, and aimed to ‘make better provision for the conservation, allocation, use, and quality of natural water.’<sup>256</sup> It remained the key statute for controlling water pollution until the Resource Management Act 1991.

Through the Water and Soil Conservation Act, the Crown took the significant step of vesting in itself sole rights to the development of water resources, including any dams, diversions, or discharges.<sup>257</sup> The Crown thereby assumed sole rights to allocate the use of water, effectively nationalising its management. After the 1967 Act was passed, the Crown immediately delegated some of its powers to regional water boards that were established to administer a system of permits for taking and discharging water. Initially, permits for discharges to classified waters remained under the overall control of the Pollution Advisory Council but, from 1971, regional water boards were granted the power to discharge into classified waters, providing the minimum water quality established by the classification was not breached. This system remained in place, largely unmodified, until the 1990s.<sup>258</sup>

The Act made no mention of Māori interests in the ownership or management of water, though the needs of industry, local authorities, fisheries, wildlife habitats, and recreational users were to be taken into account.<sup>259</sup> Because the Act treated Māori simply as part of the general public, it has been described as ‘monocultural legislation.’<sup>260</sup> Māori cultural and spiritual values in respect of water were not recognised under the legislation until the courts ruled in 1987 that they were to be considered as part of the ‘interests of the public generally.’<sup>261</sup>

The legislation also had limited success in controlling pollution. The key problem was identified by the 1981 OECD review of environmental policy in New Zealand: water classifications tended to operate as minimum standards often set below existing water quality, to which degraded state bodies of water could then deteriorate.<sup>262</sup> In addition, the system was unable to cope with diffuse (as opposed to point source) pollution.<sup>263</sup>

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256. Water and Soil Conservation Act 1967, long title

257. Ibid, s 21(1)

258. Roche, *Land and Water*, pp 121–122; doc D7, pp 186–189

259. Water and Soil Conservation Act 1967, long title

260. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim* 2nd ed (Wellington: Government Printer, 1989), p 86

261. *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 at 189

262. Cited in Roche, *Land and Water*, p 131

263. Ibid

Bacterial contamination of rivers and streams was a 'serious problem' in Tauranga by the mid-1990s. It was largely the result of continued agricultural development, combined with scant regard to riparian protection.<sup>264</sup> Particularly affected were the Wairoa, Waitao, Waipapa, and Waimapu Rivers, and the Kōpūrereroa and Te Puna Streams. In some of these waterways, industrial and urban development compounded the agricultural runoff problem.<sup>265</sup> The Kōpūrereroa Stream, for example, was found in 1994 to carry excessive loads of suspended solids and nutrients – the result of agricultural, industrial and urban development, and associated sources such as the Cambridge Road rubbish tip.<sup>266</sup>

Hydroelectricity schemes and quarrying have also detrimentally affected waterways. The Mangapapa hydro scheme affords a good example. Constructed by the Tauranga Joint Generation Committee in the late 1960s, this scheme diverted the courses of the Mangapapa, Opuiaki, and Mangakarengorengo Rivers, as well as several tributary streams. Their waters were channelled into a system of reservoirs, canals, and tunnels that feed water to three power stations.<sup>267</sup> Once the scheme became operational in 1972, Māori began to express concern over loss of flow in waterways such as the Mangapapa. When their concerns were ignored, they filed for damages.<sup>268</sup> In 1976, the Tauranga Joint Generation Committee belatedly applied to the Regional Water Board for the right to take water for power generation. Māori and other groups remained alarmed about the effects on river ecology, but the water right was granted.<sup>269</sup> As a result of this scheme, Ngāti Hangarau have lost fisheries and other resources from five of their major streams.<sup>270</sup>

The commissioning of the Ruahihi station – the final stage of the Mangapapa hydro scheme – provides an even starker example of the environmental effects of such developments. On 20 September 1981, the day after the Ruahihi station was officially opened by the Prime Minister, Robert Muldoon, over 500 metres of the canal carrying water to it collapsed. Some 1.25 million cubic metres of 'liquid mud and rubble' swept into the valley below, ending up in the Wairoa River.<sup>271</sup> The silt from the Ruahihi canal stayed in the upper tidal zone. The wildlife associated with the river almost completely disappeared for several years, and the physical character of the river altered dramatically, becoming wider and

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264. Environment Bay of Plenty, *Tauranga Harbour Regional Plan: Environmental Investigations, Water and Sediment Quality of Tauranga Harbour* (Whakatāne: Environment Bay of Plenty, 1994), p114

265. Ibid, p130

266. Ibid, pp130–131, 139

267. Document A11, pp37–40

268. Ibid, pp74–75; Rachel Willan, 'Hydro-Electricity in the Wairoa River Catchment: Land Acquisition' (commissioned research report, Wellington: Waitangi Tribunal, 1996) (doc A35), pp38–39

269. Document A11, pp90–92

270. Gerard Gardiner, brief of evidence, 27 June 2006 (doc R50), pp3–4; Henare (Henry) Hohepa Te Mete (Smith), brief of evidence, 25 September 2006 (doc S9), p8

271. Document A33, p28; Wendy Hart, 'A Comparative Study of Public Works Takings in the Tauranga Moana Inquiry District' (commissioned research report, Wellington: Waitangi Tribunal, 2006) (doc S2), p102





Figure 7.10: The Ruahihi Canal immediately after its collapse, 21 September 1981  
Photographer unknown. Reproduced courtesy of *Bay of Plenty Times* (F0108).

shallower.<sup>272</sup> Claimants note major changes to channel depths and the quality of sands, and a permanent decline in shellfish and fish owing to silt smothering essential habitat, such as eelgrass beds.<sup>273</sup>

Typical ecological effects of sedimentation include discolouration of water, loss of sunlight, damage to fish habitat, increased phosphorous supply, river diversion and bank erosion, and loss of aesthetic value.<sup>274</sup> We heard from claimants that such effects are commonplace in Tauranga waterways. The Atuaroa River and Kopuaroa Stream, for example, have been dirtied to such an extent by silt from silt from Fulton Hogan's Poplar Lane quarry that eels and kōura are no longer found in them.<sup>275</sup> The Waitao River has been seriously affected by the sediment load deposited by runoff from the Tauranga Quarries Ltd quarry in its headwaters (the Kaitimako quarry), as Kiakino Paraire described:

The Waitao Stream used to be the cupboard of the rivers for Nga Potiki. You know for the food. Eels, herrings, thousands of herrings used to come up out of that stream. You could almost walk over their backs, walk over the backs of the fish. But that's when kai was plentiful, and that stream was actually flowing. It changed after the quarry started up at Waitao. They put all the slag and slush in it . . . The water was actually clear and now its brown. That all comes from the quarry at the top there.<sup>276</sup>

This river was an important customary food source and of great cultural significance to Ngāti Pūkenga and Ngā Pōtiki in particular.<sup>277</sup> Its water, renowned for its purity, was used for rituals such as washing the implements used to sever the pito of newborn children.<sup>278</sup> As a result of the quarrying, the claimants believe the mauri of the river has been harmed, and sacred sites along it damaged or destroyed.<sup>279</sup> They say the damage extends as far as the stream mouth and into the Rangataua Estuary, where silt is reported to have built up to around one metre deep. The multitudes of pāpaka (crabs) – for which Rangataua is traditionally famous, and with which Ngā Pōtiki, Ngāti Pūkenga, and Ngāti Hē are collectively identified, as Ngā Pāpaka o Rangataua – have become 'a rare sight indeed'.<sup>280</sup> This is a bitter blow to tangata whenua, who have always believed, 'Ngaro noa ke te tangata, waiho ma nga papaka o Rangataua e mihi' ('Though people may disappear, the crabs of Rangataua will always be there').<sup>281</sup>

272. Marinus La Rooij, 'Wairoa Hapu and the Realignment of State Highway 2: Wairoa–Tauranga' (commissioned research report, Wellington: Waitangi Tribunal, 1999) (doc F2(b)), p 90

273. Document A50, p 57; Stephen Gates, brief of evidence, 13 November 1998 (doc C17), pp 2–3; doc R23, p 6

274. Document D7, p 48

275. Document U5(a), p 56

276. Kiakino Paraire, brief of evidence, undated (doc E3), p 8

277. Document U34, p 59

278. Document R45, pp 13–14

279. Rehua Smallman, brief of evidence, 26 June 2006 (doc R43), p 7; doc R45, p 13

280. Document R28, pp 15–16; doc R30, p 8

281. Stokes, *A History of Tauranga County*, p 349

**(2) *Pollution of the harbour***

Almost all these rivers and streams flow into the harbour, bringing pollution with them. A range of other sources have also contaminated Tauranga Moana, most notably sewage. For Māori, human waste is a particularly abhorrent form of pollution. Fisher, Piahana, Black, and Ohia describe the discharge of such effluent into the ‘Marae of Tangaroa’ as a violation of tapu that:

constitutes a fundamental transgression which evokes an instinctive and culturally embedded abhorrence . . . the potential exists for kai moana . . . to be contaminated with human excrement, therefore, threatening to make that which is noa, tapu, and that which is tapu, noa.<sup>282</sup>

Yet, for decades, local councils regarded Tauranga Harbour as the obvious repository for sewage. The McLean Street septic tank was approved in 1914, subject to the condition that ‘should at any time a nuisance be created from it, the Council will forthwith abate such nuisance on being required by the Marine Department’.<sup>283</sup> In fact, this tank – described by Byrnes as ‘a crude sewerage reservoir, [that] often overflowed into the harbour’<sup>284</sup> – was the subject of complaint for decades to come. The Tauranga Borough Council did propose alternatives on several occasions, but nothing eventuated as they all involved discharging sewage into the harbour at other locations, and were opposed by local residents – including many Māori.

In 1928, Māori from five coastal settlements around the harbour jointly petitioned the Minister of Health to reject Tauranga Borough Council’s proposal to discharge excess effluent onto the foreshore at Waikareao Estuary. They were concerned about the pollution of pipi beds and loss of livelihood. And with Tauranga Māori frequently affected by outbreaks of typhoid,<sup>285</sup> the petitioners were also concerned about illness: ‘fever’ the petitioners said, ‘will be rampant’.<sup>286</sup> A medical officer of health reported that the pollution was sufficiently severe that the harbour board had demanded a remedy for the problem. He acknowledged that while sewage continued to be discharged into the harbour, contamination was inevitable, but said that the proposed outfall would at least pollute fewer shellfish beds.<sup>287</sup> The Tauranga Borough Council agreed to amend the scheme, but the Health Department declined the necessary funds and nothing was done.<sup>288</sup> Tony Nightingale comments that,

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282. Document A50, pp 59–60

283. Order in Council, Tauranga Septic Tank, 4 May 1914, MD 4197, ArchivesNZ, Wellington (doc D7, p 140)

284. Document A36, p 27

285. Document A77, pp 61–62

286. Ibid, p 61

287. Tony Nightingale, ‘Tauranga Moana: A Social and Economic Impact Report, 1865–1960’ (commissioned research report, Wellington: Crown Forestry Rental Trust, 1996) (doc A39), pp 75–77

288. Document D7, pp 142–143

given the comments of the medical officer and the prevalence of typhoid amongst Tauranga Māori, this inaction 'seems inexplicable'.<sup>289</sup>

Harbour pollution became even more prevalent as Tauranga expanded after the Second World War. By the late 1940s, even local authorities and Government officials acknowledged the extent of a problem that was 'materially affecting the grounds on which we rely for supplies of commercial food fish'.<sup>290</sup> But sewage disposal remained primitive. In 1956 the Tauranga Council built a new outfall at Sulphur Point, which discharged 8000 gallons (over 36,000 litres) of raw sewage an hour, twice a day on the ebb tide.<sup>291</sup> This outfall, opposed by local residents, does not seem to have had the approval of the Marine Department.<sup>292</sup> It was not until the late 1960s that Tauranga Council began to treat sewage before discharging it into the harbour.<sup>293</sup>

A good overview of the situation was provided by the Pollution Advisory Council in 1956. Asked by the harbour board to classify the waters to prevent sewage discharge, the advisory council found many pollution sources.<sup>294</sup> They included septic tanks (notably the municipal tank at McLean Street, the hospital tank, and household tanks), ships, and the Sulphur Point outfall. The head of the Waikareao Estuary was polluted by seepage from the Tauranga Borough Council tip, a commercial laundry, and a timber treatment plant. Other industrial discharges into the harbour came from fish-processing plants, the city abattoir, a butter factory, and a fertiliser factory. Unauthorised dumping of rubbish at the harbour margins was also a problem.<sup>295</sup>

CA Cowie, from the Health Department, identified similar sources in 1957. Noting that the harbour contained Māori fishing reserves and mussel beds, he said that rapid population growth and an inadequate sewerage and reticulation system were jeopardising activities such as fishing and swimming.<sup>296</sup> His views were borne out by a Health Department inspection of sewerage reticulation plans in 1959, which identified particular problems with the hospital septic tank. The inspection team also recommended stopping the sawdust-based reclamation at Sulphur Point, as sawdust pollution was affecting fish and shellfish in the area.<sup>297</sup>

In 1961, the pollution of Tauranga Harbour was again flagged as an urgent problem, this time by the Pollution Advisory Council, which called for all local authorities in the area to

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289. Nightingale, Document A39, p 77

290. Chief inspector of Fisheries to Secretary Marine, 25 March 1948, M 1 3/13/634, ArchivesNZ, Wellington (doc D7, p 129)

291. Document D7, p 144

292. Ibid

293. Ibid, pp 145–146

294. Ibid, p 147

295. Ibid, pp 129–130

296. Ibid, p 130

297. Ibid, pp 130–131

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tackle it cooperatively.<sup>298</sup> The Tauranga Harbour Board requested that the harbour water be classified, so that no wastes could be discharged without a permit from the Pollution Advisory Council. Over the following 15 years, four different classifications were made. Tauranga Māori fought vigorously to have the harbour waters granted the highest possible classification (SA), in order to protect shellfish beds.<sup>299</sup> Their messages to local and central government were consistent. As Jack Wharekawa of the Katikati Māori Tribal Committee said in 1973:

The Maori people are anxious that the waters of the harbour should become cleaner than they are at present, especially close to our Marae, where many Maoris live. We are very concerned that the Te Rereatukahia River be made cleaner, so that our children may once again swim in the pools, which used to be clear and deep, but now are filthy with mud and slime. We want to continue to be able to collect shellfish and other foods from the harbour.<sup>300</sup>

Māori were successful to some degree, but they faced local bodies who regarded lower water classifications (SB and SC) as ‘more rational and more reasonable’.<sup>301</sup> Areas in and around Tauranga Moana were reclassified with such regularity that Māori victories were never more than temporary. Nor is it clear that classification succeeded in improving the behaviour of those disposing of waste, as is revealed in the context of specific sewerage schemes in Tauranga, Mount Maunganui, and Katikati.

**(3) Tauranga sewerage: the Sulphur Point outfall and the Chapel Street treatment plant**

In 1964 the Tauranga City Council decided to commission an upgraded treatment plant at Chapel Street, and to continue discharging the sewage at Sulphur Point into the Ōtūmoetai channel of the harbour. This plan required the Pollution Advisory Council to downgrade the SA classification of water in the vicinity.<sup>302</sup> At a special meeting of the Tauranga City Council to decide on the plan, it was mentioned that the Pollution Advisory Council would meet to hear Māori objectors ‘with a view to getting such objections withdrawn’.<sup>303</sup>

The Chapel Street treatment plant was commissioned in 1969.<sup>304</sup> It was expanded in 1979, despite considerable community opposition and findings that water quality was contaminated below SA and SB standards up to four kilometres from the outfall. According to McClean, by the 1980s ‘there was general agreement that the city discharge was unacceptable and was causing pollution of the surrounding water, especially Otumoetai

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298. Document D7, p 131

299. Roche, *Land and Water*, p 127; doc D7, pp 131–133

300. ‘Top-grade water area in harbour reduced’, *Katikati Advertiser*, July 1973 (doc D7, pp 135–136)

301. Document D7, p 135

302. *Ibid*, p 145

303. *Ibid*, pp 145–146

304. *Ibid*, p 146



Beach.<sup>305</sup> Nevertheless, effluent volumes from the plant increased into the early 1990s, with associated high bacterial levels.<sup>306</sup>

**(4) Mount Maunganui sewerage: the Rangataua oxidation ponds and ocean outfall**

Sewerage systems were even more primitive in Mount Maunganui. Until at least the early 1950s, effluent 'ended up in an open drain at Commons Avenue'. Residents relied on septic tanks until the 1970s, with the consequent possibility of leakage to the harbour and waterways.<sup>307</sup> In 1972 the Mount Maunganui Borough Council proposed a new scheme which involved substantial reclamation within Rangataua Estuary, and the construction of oxidation ponds (already discussed in chapter 4) from which effluent would be temporarily discharged into Rangataua Estuary. In time, it was proposed that an ocean outfall would be built at Omanu.<sup>308</sup>

Tauranga Māori staunchly opposed this scheme. Rangataua was important for cultural identity and for kaimoana, particularly for Ngā Pōtiki, Ngāti Hē, and Ngāti Pūkenga. As a result of Māori pressure, the Pollution Advisory Council agreed to re-classify the waters of the harbour in 1972. Rangataua Estuary, and indeed most of the harbour, was reclassified as SA, in an explicit attempt to stop the proposed discharge and to protect shellfish beds. This classification challenged the power of the local authorities to grant discharge rights.<sup>309</sup> However, the authorities succeeded in having the harbour waters reclassified back to SC again in 1973, by the newly formed Water Resources Council which had replaced the Pollution Advisory Council.<sup>310</sup>

Many Tauranga Māori actively opposed the 1973 reclassification, with the Tauranga District Māori Executive Committee emphasising 'the possible harmful effect on shellfish and other marine life which form part of the staple diet of Maori'. Its chairman, William Ohia, told the press: 'Our generation took over this asset to the district in good condition and we want to make sure that it is still good when we hand it on to the next generation.'<sup>311</sup> The Maungatapu–Hairini Residents Association argued that, because Rangataua was a traditional fishery, the classification was 'contrary to the spirit of the Treaty of Waitangi'.<sup>312</sup>

Before any appeal could be heard, the reclassification was dropped. However, water classifications were generally abandoned as a nationwide policy instrument in 1975 after the courts warned against the practice of adopting lower standards than the existing water quality. The result was ad hoc and localised responses.<sup>313</sup> In Tauranga, the Regional Water

305. Ibid

306. Document A25, pp 79, 81, 217

307. Document D7, pp 147–153

308. Ibid, p 148

309. Ibid, pp 133–134

310. Document D7, app C, p 189; Roche, *Land and Water*, p 128

311. Document D7, p 135

312. Ibid, p 136

313. Roche, *Land and Water*, p 131; doc D7, app C, p 189

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Board set an SC classification over the entire harbour. The chief engineer stated that it was ‘a pointless exercise to set unrealistic water quality standards’, and argued that urban and agricultural development made the adoption of SA or SB classes ‘impractical’.<sup>314</sup> Nevertheless, an SA classification was clearly not unreasonable for some parts of the harbour: research conducted for the Regional Water Board over 1974 had shown that Welcome Bay, at least, was still in excellent ecological condition.<sup>315</sup>

Once again, Māori protested the reclassification vigorously. So did the Bay of Plenty Harbour Board, which disputed the Regional Water Board’s right to set the standard.<sup>316</sup> The Tauranga Māori Executive wrote to the Regional Water Board that:

[T]he harbour has always represented a traditional food supply source for the Maori people, and any attempt to lower the water classification standards of the Harbour, will lead to a wider use of the harbour waters as an outlet for more sewage, and the eventual desecration of the shell-fish beds, and breeding grounds of the many varieties of fish that inhabit the harbour.<sup>317</sup>

Gaining no satisfaction from the Regional Water Board, the Tauranga Māori Executive wrote to the Minister for the Environment regarding the effort to lower water standards in the harbour:

We maintain that the effects of harbour pollution is not only a health hazard to people using the harbour as a food source and a recreational area, but it is also detrimental not only to the large number of Maraes along its shore lines, but also to those sites of early Maori settlement. This Executive has always tried to prevent the polluting of the waters of Tauranga Harbour, and whenever efforts, regardless of whether these efforts have been initiated in the name of progress, this Executive has always continued to voice its opposition. And we shall continue to do so . . .<sup>318</sup>

This letter was forwarded to the Commissioner for the Environment who, however, was satisfied that the Regional Water Board intended to improve harbour water quality: the board had apparently begun to require polluters to apply for a right to discharge waste into water, and to impose minimum standards for discharges into the harbour.<sup>319</sup>

314. Document D7, p 136

315. Ibid, app E, pp 203–204

316. Ibid, p 139

317. Ibid, p 138

318. Ibid, p 139

319. Ibid, p 139, fn 324; ED Revington, chief engineer, to town clerk, Tauranga City Council, 6 September 1976, pp 1–2 (McClean, ‘Tauranga Moana: Fisheries, Reclamations, and Foreshores Report: Volume Three: Document Bank: Part Three: Water Pollution and Water Classification’ (doc D7(a), pt 3, pp 166–167); ED Revington, commission engineer, letter entitled: ‘Discharge of Treated Waste into Tauranga Harbour’, 11 April 1973, pp 1–2 (doc D7(a), pt 3, pp 171–172)



In the event, the Maunganui Borough Council abandoned the plan to temporarily discharge to the estuary after becoming embroiled in a succession of appeals – including a very early claim to the Waitangi Tribunal (Wai 3). Instead, it sought to immediately build the ocean outfall and oxidation ponds.<sup>320</sup> A 1974 environmental impact report acknowledged that ‘a flourishing ecosystem on the tidal flats would be lost’ through reclamation, but concluded that the ponds themselves would have only minor ongoing effects.<sup>321</sup> But the Commissioner for the Environment maintained that the reclamation was not justified, because of the impact on the area and the possibility of other sites being used.<sup>322</sup> Despite this opposition – and more from Paraone Rewiti (member for Eastern Māori), the Ministry for Agriculture and Fisheries, and the Ministry for Transport – the plan became effective through the Mount Maunganui Borough Reclamation and Empowering Act 1975.<sup>323</sup>

Witness Desmond Kahotea told us that no cultural or archaeological assessment was undertaken before work started. However, he monitored the impact on sites of significance within the harbour as the ponds were constructed:

I watched the excavation to see if cultural items were uncovered and one of the contractors told me that the Council was considering taking borrow from a hill/pa called Ohotumaihi. I contacted and met the head of engineering and showed him that the site has been recorded as an archaeological site and was identified in a 1976 archaeological report.<sup>324</sup>

Several tangata whenua witnesses spoke about the environmental and spiritual impact of the ponds on the harbour. They especially stressed the now sparse titiko (periwinkle, or mudsnail) population.<sup>325</sup> Haare Williams, for example, stated

Today titiko are simply empty shells floating with the flotsam which laps along the fore-shore at high tide. The substance of the wairua of Rangataua has been butchered by the lust of commercial enterprise and development around the harbour. The people of Nga Potiki are now unable to provide kai a te rangatira, the Titiko, to their manuhiri.<sup>326</sup>

Pine McLeod stated that ‘our birds are still dying from avian botulism in the pond’.<sup>327</sup>

When the Mount Maunganui Borough Council and Tauranga City Council amalgamated in 1989, their two sewerage treatment systems became jointly managed. The Tauranga City Council ceased discharging the sewage treated at Chapel Street into the harbour, and all sewage was piped to the oxidation ponds at Te Maunga. After consultation with Māori in

320. Document D7, pp 151–153

321. Heather Basset and Richard Kay, ‘Crown Acquisition and Desecration of Ngā Potiki Land’ (commissioned research report, Wellington: Waitangi Tribunal, 1999) (doc E1), pp 73–74; doc D7, p 152

322. Document E1, p 83

323. Document D7, pp 152–153

324. Document E18, pp 18–19

325. See document E14; doc E5, pp 4–5; doc E26, pp 3–4

326. Document E5, p 8

327. Pine McLeod, brief of evidence, 26 June 2006 (doc R27), p 6

late 1990, it was agreed that wetlands would be added to the complex as filters before wastewater was discharged to the ocean.<sup>328</sup> Both the manner of the installation, and the ongoing operation of the complex, remain highly controversial among local Māori.

**(5) Katikati: dairy factory waste and Matakana Island sewerage outfall**

Discharges into the western reaches of the harbour have also been problematic. In the mid-1960s, the Katikati Dairy Co-operative was discharging about 200,000 gallons (over 900,000 litres) of water, and 6000 gallons (over 27,000 litres) of casein whey, into the harbour daily. The Pollution Advisory Council permitted the factory to continue with this discharge on condition that it was ‘Substantially free from suspended solids, grease and oil. In the classified waters [of the harbour], the waste discharge shall not cause any conspicuous discolouration nor give rise to offensive smells.’<sup>329</sup> This permission would allow the dairy company and its successor, the Bay of Plenty Co-operative Dairy Association Ltd, to continue discharging waste into Tauranga Harbour until 1979, despite increasing production.

Considerable public disquiet prompted the dairy company to commission biological surveys in 1974 and 1975. They showed the discharge was causing ‘considerable adverse ecological changes’ (including discolouration, surface scum, disappearance of microfauna, sediment deposition, and algae growth) and contributing towards ‘serious pollution’ of the harbour.<sup>330</sup> A subsequent inspection by the Regional Water Board concluded that the factory was releasing approximately 310,000 gallons of waste daily (around 1.4 million litres), and placing the same biochemical oxygen loading on the harbour as a city of half a million people.<sup>331</sup>

Faced with losing its discharge permit, the dairy company switched to another option: a pipeline issuing at an ocean outfall off Matakana Island.<sup>332</sup> This pipeline (the subject of claims Wai 228 by the Matakana hapū and Wai 854 from Ngāti Tamawhariua) runs from Katikati, across the harbour and Matakana Island, and terminates 650 metres off the beach on the ocean side of the island.

It was originally installed to dispose of just the Katikati dairy factory’s waste, but from the outset, the dairy company contemplated the pipeline carrying domestic sewage from Katikati and possibly Ōmokoroa as well.<sup>333</sup> The company did not, however, mention this possibility in its formal application for an ocean outfall, nor when the application was pub-

328. Antoine Coffin, ‘A Study of Environmental Planning in Tauranga Moana since 1991’ (commissioned research report, Wellington: Waitangi Tribunal, 2006) (doc s7), pp 55–56

329. Pollution Advisory Council, Permit to Discharge, 1 July 1965 (Robert A McClean, ‘Matakana Island Sewerage Outfall Report: Volume One and Two: Main Report and Appendix’ (commissioned research report, Wellington: Waitangi Tribunal, 1998) (doc B4), p 49

330. Bioresearchers, *A Preliminary Assessment of Some Aspects of the Ecology of Tauranga Harbour*, April 1974 (doc B4, p 50)

331. Document B4, pp 51–52

332. Ibid, p 55

333. Ibid, p 52



Figure 7.11: Katikati Co-operative Dairy Company factory, 1948

Photograph by W Walker. Reproduced courtesy of Archives New Zealand: National Publicity Studios Collection,

licly notified. While the company met with affected property owners and a range of other authorities and organisations, Matakana Island Māori were not directly notified of the proposal, nor invited to meetings.<sup>334</sup> Their use of the ocean-side beach and kaimoana was first ignored, then said to be unaffected by the proposed outfall. The company relied on a waste management report prepared by private consultants, which limited its discussion of environmental effects to generalisations,<sup>335</sup> and an environmental impact report prepared by Bioresearchers Ltd (which was responsible for the earlier biological surveys). The latter report noted that Matakana Island residents gathered shellfish of ‘excellent eating quality’ from the outfall area, but stated that the proposed disposal presented no ‘major threats’ to the water quality or ecology of the outfall area or adjacent shore.<sup>336</sup>

334. Ibid, pp 55–57

335. Murray-North and Partners, ‘Feasibility Report on Disposal of Effluent from Katikati Factory to Sea Outfalls’, November 1976, p 3 (doc B4, p 52)

336. Bioresearchers Ltd, *Disposal of Effluent from Katikati Factory to Coastal Waters*, April 1977 (doc B4, pp 58, 140–141). From the information provided to us in evidence, it would seem that the effluent consisted of milk waste and did not include sewage.

On 7 July 1977, the water right application was granted without objections or appeals. That same month, the dairy company formally invited the Tauranga County Council to participate in the ocean outfall scheme and the council applied to the Regional Water Board for a discharge right using the company's pipeline.<sup>337</sup> The application was twice advertised in the *Bay of Plenty Times* in September 1977, and copies of the advertisement sent to a wide range of interested parties, but not to any representatives of affected Māori communities. The permit was granted, despite evidence that there would be some bacterial contamination of the waters near the outfall. One local resident lodged an objection on the grounds that the sewage was untreated, saying that most people were probably unaware of the fact: the application had described the discharge as 'comminuted domestic sewage'.<sup>338</sup> Sure enough, there was an outcry after the permit was granted, particularly from the residents and borough council of Waihi Beach. A letter to the local newspaper queried how many people knew that 'comminuted' meant simply 'pulverised raw sewage'. Other letters referred to shellfish gathering in the area, especially by local Māori. A neighbouring landowner lodged a late objection to the scheme, saying that she had only just become aware of the matter.<sup>339</sup>

The Regional Water Board responded to the outcry by saying that the discharge was considered acceptable because the seaward side of Matakana Island was of little public use. The Minister of Health lent his support to the scheme, citing departmental policy to 'encourage the disposal of effluent into the ocean at points which are inaccessible to the general public and where no significant contamination can occur'.<sup>340</sup>

Throughout this debate, the fact that Bio researchers Ltd had provided amended evidence the day after the water right was granted went without mention; instead, an earlier, more favourable, version was cited.<sup>341</sup> In fact, Bio researchers' revised evidence stated that occasional contamination by faecal coliform bacteria could occur up to 1100 metres from the outfall, and 600 metres towards the shore, as compared with the original assessment that all water would be 'reasonably pure 200 metres from the outfall'.<sup>342</sup> After the Katikati Dairy Factory closed in 1982, the Tauranga County Council decided to purchase the pipeline, using a loan from the Local Authorities Loans Board. This, and the earlier loan extended to the council when it first bought into the pipeline, were considered by the Department of Health and the Ministry of Works, and signed off by the Ministers of Finance and Health.<sup>343</sup> From this point onwards the pipeline's sole purpose was to discharge sewage.

We have no satisfactory evidence that Matakana Island residents were ever informed about or consulted over the decision to use the pipeline to discharge sewage. One council-

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337. Document B4, p 66

338. Ibid, pp 66–68, 70

339. Ibid, pp 71–74, 77

340. Ibid, pp 75, 78

341. Ibid, pp 79, 83

342. Ibid, p 83

343. Ibid, pp 84–85, 88

lor of the time claimed in the press that the council ‘would have sought and been given permission for the pipeline through a leader of the iwi.’<sup>344</sup> Glen Snelgrove, chief executive of Western Bay of Plenty District Council, was unable to confirm to us whether any such consultation had, in fact, taken place.<sup>345</sup>

Meanwhile, Matakana Island Māori remained unaware that sewage was being discharged untreated, until it was stated in a 1991 newspaper article.<sup>346</sup> This was despite one resident, Hauata Palmer, having asked the Tauranga County Council in the late 1980s whether the discharge was treated. The council replied that the discharge was ‘subject to milliscreening’ (fine filtering), but did not explain the term. Once residents were alerted to the raw state of the sewage, there was anger and a sense of betrayal. At a meeting in 1992, the Matakana Island Trust agreed that: ‘[t]he discharge of raw sewerage [*sic*] is absolutely not acceptable and the community at large demand some remedial measures take place to address this issue.’<sup>347</sup> The Tauranga Moana District Māori Council also contacted the Tauranga County Council, asking (as Mr Palmer had done) about the risk of shellfish contamination. The County Council assured them there was none.

It would seem, however, that testing at the time was highly unreliable.<sup>348</sup> When the pipeline was constructed, a condition of its use was regular testing. Neither the dairy company nor the Tauranga County Council initially complied with this condition. Once regular monitoring began, the amended Bio researchers report was found accurate: depending on weather conditions and time of day, shellfish up to 1000 metres from the outfall could be heavily contaminated. Shellfish near the outfall were unfit for human consumption at all times.<sup>349</sup> In particular, a comprehensive study by consultants Beca Steven found that ‘there is a significant impact by effluent of a fairly young age’ that would exceed bathing water standards 8 per cent of the time, and shellfish water standards 12 per cent of the time.<sup>350</sup> This report finally prompted movement towards an upgrade of the treatment and disposal of Katikati sewage. Matakana Island Māori and others now actively opposed the piping of sewage into the ocean, but their concerns continued to be marginalised. A 1990 district council report, for example, called for the harbour to be cleaned up to arrest falling environmental standards, but it took for granted the continued use of the Matakana Island outfall and the addition of three other ocean outfalls. The report did not mention Māori objections.<sup>351</sup>

344. ‘Former Councillor says Consultation Happened’, *Katikati Advertiser*, 9 April 1996 (doc T4, attachment 12, p145)

345. Glenn Snelgrove, brief of evidence, 29 September 2006 (doc T4), p 9; doc 4.7, pp 90–91

346. Document J22, p 12; doc B4, pp 91–92, 105

347. MJ Reed, services engineer Tauranga County Council to Howard Palmer, 1 December 1988 (doc B4, p 92); CT McGlynn for the Matakana Island Trust to secretary Tauranga County Council, 14 June 1992 (doc B4, p 106)

348. Document B4, pp 92–93

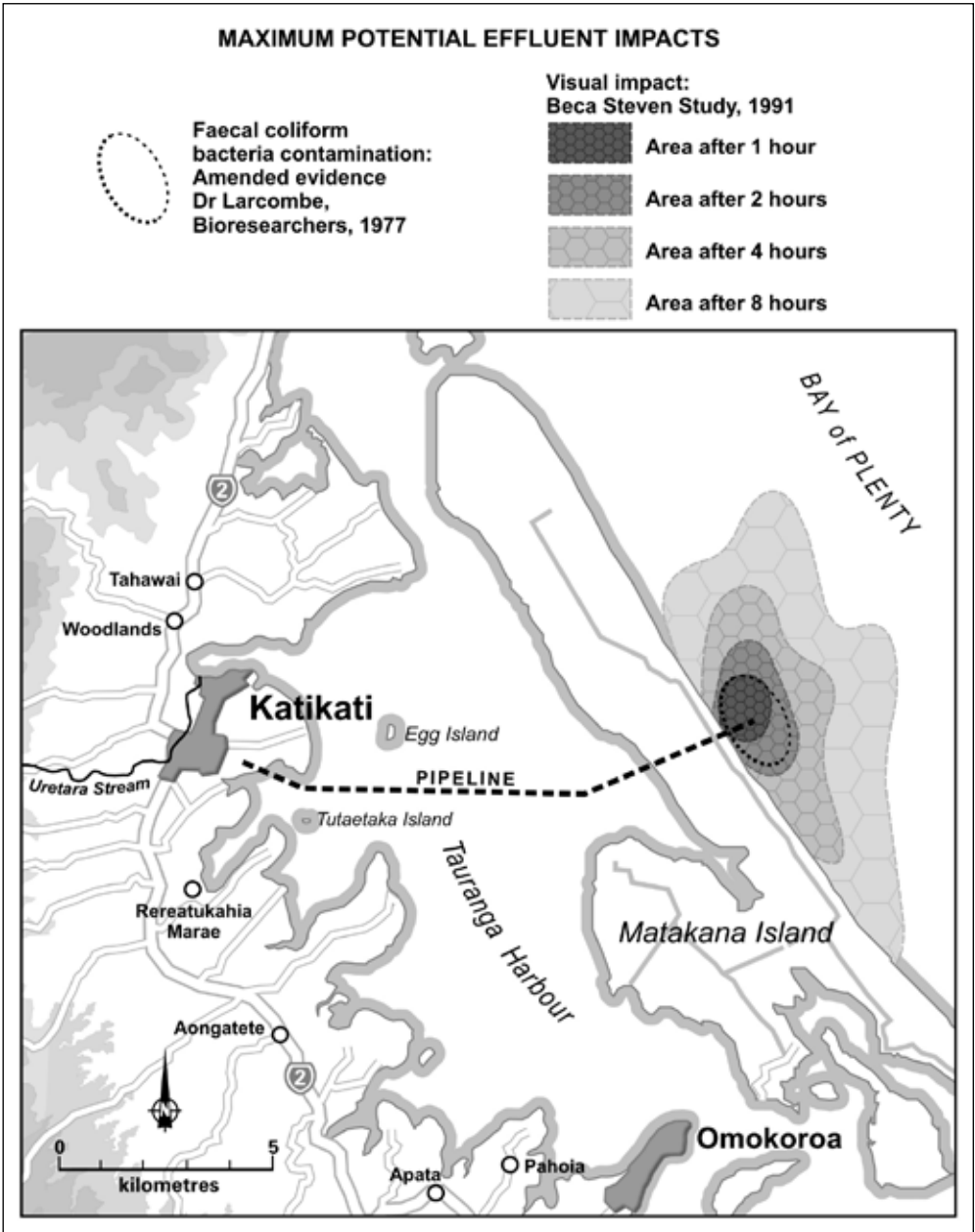
349. Ibid, p 98

350. Beca Steven, ‘Western Bay of Plenty Sewerage: Water Right Study of Bay of Plenty Ocean Foreshore Waters’, study report prepared for Bruce Henderson Consultants Ltd, June 1991 (doc A20), pp 100, 109

351. Document B4, pp 99–101

7.5.3(5)

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**(6) Conclusions**

During the period from 1886 to 1991, Tauranga Harbour and other waterways were polluted by numerous discharges, including sewage and stormwater outfalls, septic tank seepage, urban runoff, rubbish tip seepage, agricultural runoff, and industrial wastes. Since at least 1928, Māori have vigorously opposed such pollution, taking their concerns to local bodies and the Crown. Their position has been clear and consistent throughout: any harmful discharge into the harbour, or into key waterways such as the Wairoa, is culturally unacceptable.<sup>352</sup>

This is especially true of sewage. Māori regard the discharge of sewage into waterways as culturally abhorrent, and a threat to the health of key habitats such as estuaries. Their concerns have focused particularly on the McLean Street septic tank, the Sulphur Point outfall, the Mount Maunganui discharge at Rangataua Estuary, and the Matakana Island outfall. The effect of pollution on other resources, especially fisheries, has been an enduring issue to which we now turn.

**7.5.4 Losing customary fisheries**

Many of the claims we heard focused on customary fisheries – including freshwater, inshore, shell, and fin fisheries – reflecting the enormous economic and cultural significance of kaimoana to Tauranga Māori. Concerns were expressed about both the physical state of the fishery and the legal regime governing access to customary non-commercial fishing. Claimants told us of fisheries that were diminishing or had been lost altogether, describing this as one of the Crown's most serious Treaty breaches.<sup>353</sup> The Crown, meanwhile, acknowledged that Māori non-commercial fishing rights continue to be subject to the principles of the Treaty of Waitangi and give rise to Treaty obligations on the Crown's part.<sup>354</sup> In other words, Māori retain the right to exercise tino rangatiratanga over their customary fisheries.

**(1) Crown control of fisheries**

The English version of the Treaty explicitly protected Māori in the 'full exclusive and undisturbed possession' of their fisheries. These were the rights which Hori Ngatai first reasserted before the Crown's representatives in 1885, and which Tauranga Māori sought to have upheld in years to come.

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352. Document D7, p 154

353. Claims particularly mentioning customary fisheries include, but are not restricted to, Wai 211 (Ngāi Tūkairangi), Wai 356 (Ngāti Ranginui), Wai 362 (Ngāti Ruahine), Wai 489 and Wai 947 (Ngāti Kuku of Ngāi Te Rangi), Wai 540 (Ngāi Te Rangi), Wai 637, Wai 751 and Wai 1178 (Ngāti Pūkenga), Wai 659 (Ngāi Tamarāwaho of Ngāti Ranginui), Wai 664 (Waitaha), Wai 715 and Wai 854 (Ngāti Tamawhariua ki Matakana), Wai 717 and Wai 821 (Ngā Pōtiki), Wai 1226 (Ngāti Hinerangi and hapū)

354. Document U29, p 45

However, believing that English common law automatically extended to New Zealand, Europeans settling here have long believed that all people have a common right to all sea fisheries.<sup>355</sup> Freshwater fisheries have also been subject to common law presumptions in that fishing rights in waterways have typically flowed from the presumption of ownership to the middle line of the river.<sup>356</sup> The Crown has legislated, and the courts have ruled, on the basis of these common law assumptions.

The *Ngai Tahu Sea Fisheries Report* contains a full discussion of historic fisheries legislation. We do not intend to repeat that here, save to very briefly note where and how the Crown has provided for Māori interests in customary fisheries.<sup>357</sup> The key point is that, between the Crown and the courts, the common right of all to fish in the sea and tidal waters has been 'elevated virtually to a constitutional principle'.<sup>358</sup> In particular, the 1914 decision of the Court of Appeal in *Waipapakura v Hempton* found that the common law precluded any sort of exclusive Māori rights to fish under the Treaty. Such rights could therefore only be conferred by the Crown via statute.<sup>359</sup>

The scant legal protection that the Crown has afforded to Māori fishing rights in statute has taken two forms: broad and general protections, and specific provisions.<sup>360</sup> General protections were nominally strongest between 1877 and 1894, when Māori Treaty rights in their fisheries were recognised by section 8 of the Fish Protection Act of 1877. The Act ended with a clause stating that:

Nothing in this Act contained shall be deemed to repeal, alter, or affect any of the provisions of the Treaty of Waitangi, or to take away, annul, or abridge any of the rights of the aboriginal natives to any fishery secured to them thereunder.<sup>361</sup>

This clause was inserted into the Act on the express intervention of the Governor, Lord Normanby, after Parliament declined to pass a much weaker provision.<sup>362</sup> Precisely what rights were thereby protected remained untested, however, and as the *Muriwhenua Fishing Report* found, this provision was most likely 'window dressing'.<sup>363</sup> It was repealed in 1894. No further general provision for Māori fisheries was made until the Fisheries Act 1908 provided that 'Nothing in this Part of this Act shall affect any existing Maori fishing rights'.<sup>364</sup> This provision, as re-enacted in subsequent legislation, remained in force until 1989 (though

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355. Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report*, pp 154, 174

356. Law Commission, *The Treaty of Waitangi and Maori Fisheries: A Background Paper*, NZLC PP9 (Wellington: Law Commission Report, 1989), p 75

357. Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report*, pp 134–288

358. Law Commission, *The Treaty of Waitangi and Māori Fisheries*, p 128

359. *Ibid*, p 56

360. Waitangi Tribunal, *Report on the Muriwhenua Fishing Claim*, p 96

361. Fish Protection Act 1877, s 8

362. Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report*, p 137

363. Waitangi Tribunal, *Report on the Muriwhenua Fishing Claim*, p 85

364. Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report*, p 153

slightly amended once the Fisheries Act 1983 deleted the word ‘existing’ as redundant).<sup>365</sup> However, the source or extent of ‘existing Māori fishing rights’ remained undefined.

Specific provisions for Māori interests in fisheries began with early legislation regarding oysters, and were later extended to other shellfish.<sup>366</sup> Various Acts provided for the creation of closed areas and Māori oyster reserves. From 1900 to 1962, there was legal provision (originally under the Māori Councils Act 1900, and later under the Māori Social and Economic Advancement Act 1945) for Māori to have exclusive management and control over shellfish beds and fishing grounds.<sup>367</sup> Māori requested reserves many times over the 62 years these provisions remained on the statute books. However, it seems no such reserves were ever made.<sup>368</sup>

The Crown was willing to limit fishing in certain contexts, closing areas for specific species or methods of fishing.<sup>369</sup> From time to time, this occurred in and around Tauranga. Between 1890 and 1901 the Minister of Marine closed Tauranga Harbour to oyster fishing to protect the fishery; nevertheless in 1923, the chief inspector of fisheries described oyster beds as ‘practically wiped out over twenty years ago’ in Katikati Harbour and the Bay of Plenty generally.<sup>370</sup> Similarly, in 1929, commercial fishers were stripping the mussel beds opposite Katikati. The clerk of the Katikati Domain Board wrote to the harbour board on behalf of Māori living near Bowentown, asking that commercial fishing be limited. If not, ‘the Natives as well as the visitors to the Domain . . . [would lose] the use of these shellfish’.<sup>371</sup> In April 1930, after a marine biologist confirmed that the shellfishery was endangered, the Governor issued an order in council banning the commercial taking of mussels from the location.<sup>372</sup> This restriction was lifted in 1941 after the harbour board reported that mussels were now so numerous as to be a menace.<sup>373</sup>

In 1924, Māori successfully opposed an attempt by the local chamber of commerce to entirely prohibit netting within the Harbour. They told the Minister of Marine that this ‘would be an infringement of their rights under the Treaty of Waitangi’.<sup>374</sup> At the same time, Māori sought to restrict commercial trawling or seine netting in or around Tauranga Moana, to combat stock depletion. They consistently argued that these methods had diminished fish

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365. Law Commission, *The Treaty of Waitangi and Maori Fisheries*, p 57; Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report*, p 196

366. Oyster Fisheries Act 1892, s 14; Sea Fisheries Act 1894, s 17; Sea-Fisheries Act Amendment Act 1896, s 3

367. Maori Councils Act 1900, ss 16(9), 16(10)

368. Waitangi Tribunal, *Muriwhenua Fishing Report*, pp 100–103; Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report*, pp 208, 210

369. Document D7, pp 104–113

370. Document A77, pp 59–60

371. *Ibid*, p 62

372. *Ibid*, pp 62–63; Regulations Prohibiting Taking of Mussels for Sale from Portion of the Tauranga Harbour, 7 April 1930, *New Zealand Gazette*, 1930, no 27, p 1134

373. Document D7, p 103

374. *Ibid*, p 108

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stocks, and forced their smaller boats out of operation.<sup>375</sup> A 1920 inquiry by senior Fisheries staff, for example, heard evidence that the trawlers were destroying whole schools of snapper, gurnard, and terakihi. The inquiry's report made no specific mention of Māori interests, despite hearing evidence from Māori fishing communities.<sup>376</sup>

On the issue of trawling and seine netting, there have been periods when most of Tauranga Moana was in fact better protected than the area farther along the Bay of Plenty coast. Trawling, for example, was prohibited within Tauranga Harbour and all along the coast from 1907, but then, between 1921 and 1938, restrictions were lifted over the area east of the Waihi Estuary. Similarly, Danish seine netting, which began in the Bay of Plenty in the early 1920s, was prohibited inside Tauranga Harbour from 1928, but the prohibition was not extended to the wider Bay of Plenty until 1938.<sup>377</sup> In 1937 the Crown created a comprehensive framework for the conservation of fisheries. The number of licences, range of methods, and areas open were all controlled, and vessels were required to operate from and return to the sole port specified in their licence.<sup>378</sup>

The Crown did not, however, respond positively when Tauranga Māori sought exclusive control over various fisheries. In 1947, Katikati Māori convened a hui attended by representatives of all Tauranga iwi to discuss the conservation of fish and the reservation of pipi beds. A petition to the Prime Minister resulted, asking that 'the harbour from Tauranga to Katikati be reserved for Maori fishing' owing to depletion by trawlers.<sup>379</sup> The Government appointed two honorary fishery officers, but they were unable to stop the beds being damaged by people using tools and automobiles when taking shellfish. This prompted the Athenree Bowentown Tribal Committee to ask that pipi beds be brought under their control in 1950. The Crown denied this request, but did regulate against the methods Māori complained of.<sup>380</sup>

Māori around New Zealand were stimulated by the Māori Social and Economic Advancement Act 1945, which renewed the provision to allow for exclusive Māori control over fisheries. In 1948 the Matakana Tribal Executive asked that they be granted control over waters off part of the island. They stated the area would be controlled by their people, fished for hui only, and not using commercial methods.<sup>381</sup> But the Marine Department was vehemently opposed to the establishment of exclusive fisheries for Māori. It considered that prohibiting commercial exploitation of shellfish near Māori villages catered for Māori interests. The department sought to have the law altered to remove the possibility of exclusive

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375. Document D7, pp 104–114

376. Ibid, p 106

377. Ibid, pp 104–115

378. Waitangi Tribunal, *Muriwhenua Fishing Report*, pp 110–111

379. Document A77, pp 65–66

380. Ibid, p 66

381. Ibid, pp 63–64

fisheries and meanwhile opposed all applications, including that from Matakana.<sup>382</sup> The Secretary of Marine's statement of official policy in 1948 expressed the prevailing view that 'unsavoury repercussions . . . would most certainly arise' if areas were 'reserved for the sole use of one section of the community only'.<sup>383</sup>

During the 1960s and 1970s, the Crown moved to expand the fishing industry by removing the restricted licensing system.<sup>384</sup> At the same time, Tauranga's urban and industrial footprint was growing rapidly, placing unprecedented pressure on Tauranga Moana's customary fisheries. Despite the diminution of fishing stocks, the Crown extended no protection to Māori traditional fisheries until the Fisheries Act 1983. This provided for the Director-General of Fisheries to:

confer on specified communities special rights or privileges or apply special conditions relating to boundaries, species, gear or methods, periods of time, quantities, or any other measure for the management or conservation of finfish, shellfish, or aquatic life in the area in which the specified community resides.<sup>385</sup>

The regulation did not, however, mention Māori fishing per se.

In 1986, another set of regulations was issued under the 1983 Act. The new regulation 27 now provided for 'fish, aquatic life, or seaweed' to be taken for hui and tangi. Three years later, the Māori Fisheries Act 1989 was passed 'to make better provision for the recognition of Māori fishing rights secured by the Treaty of Waitangi'. Except for the untested provisions of the Fish Protection Act 1877, this was the first Crown legislation to make significant acknowledgement of Māori fishing rights since the Treaty itself.<sup>386</sup> This Act initiated the modern management regime, which is discussed in section 7.6.

## **(2) The depletion of customary fisheries: causes and consequences**

Concerns about the decline of fisheries in Tauranga Moana were first raised by critics of commercial trawling and netting, including Māori fishermen, as far back as the early twentieth century. But the tangata whenua witnesses before us generally believed that sufficient stocks to sustain their needs existed until the 1960s, and only then began a severe and continuing decline.<sup>387</sup> This is consistent with the nationwide trend identified by the Muriwhenua Tribunal.<sup>388</sup> Anthony Fisher, of Ngāi Tūkairangi, summed up the problem from a Ngāi Te Rangi perspective when he told us:

382. Ibid, p 64

383. Law Commission, *The Treaty of Waitangi and Maori Fisheries*, pp 176–177; Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report*, p 197; doc D7, pp 119–120; doc A77, pp 64–65

384. Waitangi Tribunal, *Muriwhenua Fishing Report*, pp 111–112

385. Fisheries (Amateur Fishing) Regulations 1983, regulation 7

386. Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report*, pp 238, 283; Fisheries (Amateur Fishing) Regulations 1986, regulation 27

387. Document A50, pp 135–136

388. Waitangi Tribunal, *Muriwhenua Fishing Report*, pp 111, 223

Ngai Tukairangi were dependent for our very survival upon the resources of Tauranga Harbour. In addition the Harbour and its resources were also part of the cultural identity of Ngai Tukairangi. Although Tauranga Harbour is very beautiful, today it bears little resemblance to the Tauranga Harbour of 160 years ago, little resemblance to the Tauranga Harbour of 65 years ago when my mother was a teenager and has even changed significantly from the Tauranga Harbour of 35 years ago when I was a teenager . . . these changes have not been caused by nature, they are changes that have been made by people and institutions. They continue to occur, almost relentlessly decade after decade as a consequence of the growth and development of the Tauranga district, with little thought of the consequences for Ngai Te Rangi . . . Thus the ability of successive generations of Ngai Te Rangi to maintain their cultural practices and connections continues to diminish. Access to resources, in particular fish and kaimoana from Tauranga Moana has dramatically decreased. My son does not have the opportunity to do the things that I did when I was a child in the Harbour. I didn't have the opportunity to do all of the things, learn all of the place names and the significance of events that are attached to them that my mother did . . . Thus the Ngai Te Rangi relationship with the Harbour diminishes with each generation.<sup>389</sup>

Tangata whenua say various factors have caused the decline of customary fisheries, and their access to and control over them. The biggest single factor is increased commercial and recreational fishing. They attribute the destruction of the local snapper fishery to commercial trawling in and around the harbour.<sup>390</sup> The flounder fishery has also been affected by commercial operations, some of which Keni Piahana, of Ngāi Te Ahi, believed were unregistered.<sup>391</sup> Dudley Walker, of Ngāti Ruahine, argued that commercial operators using aqualungs are a continued threat to mussel and kina resources.<sup>392</sup> Hauata Palmer, of Ngāi Tūwhiwhia (Matakana Island), argued that such losses affect not just single species; they have unbalanced the harbour's ecology as there are too few fish to restrict shellfish numbers and maintain healthy beds.<sup>393</sup>

Meanwhile, recreational fishing has had a growing impact, particularly during summer.<sup>394</sup> Te Awanuiarangi Black, on behalf of Ngāti Pūkenga, mourned the depletion of especially prized mussel beds known as Marutuahu (the 'Wedding Cake' or Sunken Reef) during the 1990s. Although he reported his concerns to the Ministry of Agriculture and Fisheries at the time, and suggested a rāhui, no action was taken and the beds, he says, have still not recovered.<sup>395</sup> We also heard of the tangata whenua's intense frustration at being unable to control the irresponsible behaviour of others. For example, infuriated tangata whenua have

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389. Document R3, pp 10–11

390. Document A50, p 138; doc J22, p 11

391. Document G26, p 7

392. Dudley Walker (doc A50, pp 132–133)

393. Hauata Palmer, brief of evidence, undated (doc J20), p 6

394. Document A50, p 133

395. Document R45, p 14



observed people filling buckets with just the ‘butter’ (flesh) of shellfish, or using spades, destructive forms of over-fishing which they have been powerless to prevent.<sup>396</sup>

Witnesses from the hapū whose ancestral lands surround the estuaries of Tauranga Harbour described how the development of the port and harbour works had affected their fisheries and access to them. Lance Waaka, of Ngāti Ruahine, described the effect of the construction of the Sulphur Point marina:

Before the land was dredged and reclaimed we’d get our cockles and pipis from down by where the Sulphur Point marina is now. You can’t get them now, and we’re brassed off. If you take more than 250 you’d get fined, but the Council allowed the land there to be dredged and a channel dug right through to put in the marina which destroyed them all. They put the marina in to make money, the council gets rentals from the million dollar boats parked over our kai [whereas] we were going there for a feed.<sup>397</sup>

Dredging of the harbour to deepen channels has destroyed or disturbed numerous and extensive areas once rich in shellfish beds.<sup>398</sup> As one witness said:

A lot of those areas of the seabed, out at Oikemeoke, are a desert, there’s nothing there. There are no pupu, there’s nothing, nothing, it’s just gone to wasteland . . .<sup>399</sup>

Siltation caused by port construction, transport infrastructure, and agricultural development has also detrimentally affected the ecology of the harbour and its fisheries. Keni Piahana notes that the Hairini causeway across the Waimapu Estuary has contributed to the build-up of some 1.5 metres of silt in the estuary. Tidal pools and channels have silted up, removing much of the habitat for fish and damaging what habitat remains by raising water temperatures. Nursery stock are less likely to survive in such conditions.<sup>400</sup>

Many witnesses told us that pollution has greatly reduced fish and shellfish numbers and, in the case of human waste, created the risk of contamination. Many said that they no longer felt it was safe to eat seafood or swim in the waters of much of the harbour. Mawete Gardiner, of Tauwhao Te Ngare, also identified other forms of environmental modification that had negatively affected kaimoana – including erosion around Rangiwaea (caused by the wash from the many passing boats) and increased amounts of silt.<sup>401</sup> Brian Dickson, for Ngāi Te Rangī, pointed to other contaminants in the harbour, such as agricultural chemicals and animal effluent.<sup>402</sup> He also referred to the inadvertent introduction of foreign species

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396. Document A50, p140

397. Document Q5, p8; doc Q7, pp 4–5

398. Document A50, p 49

399. Peter Rolleston (doc A50, p143)

400. Document G26, p9

401. Mawete Molly Gardiner, brief of evidence, undated (doc R19), p7

402. Document R26, p5

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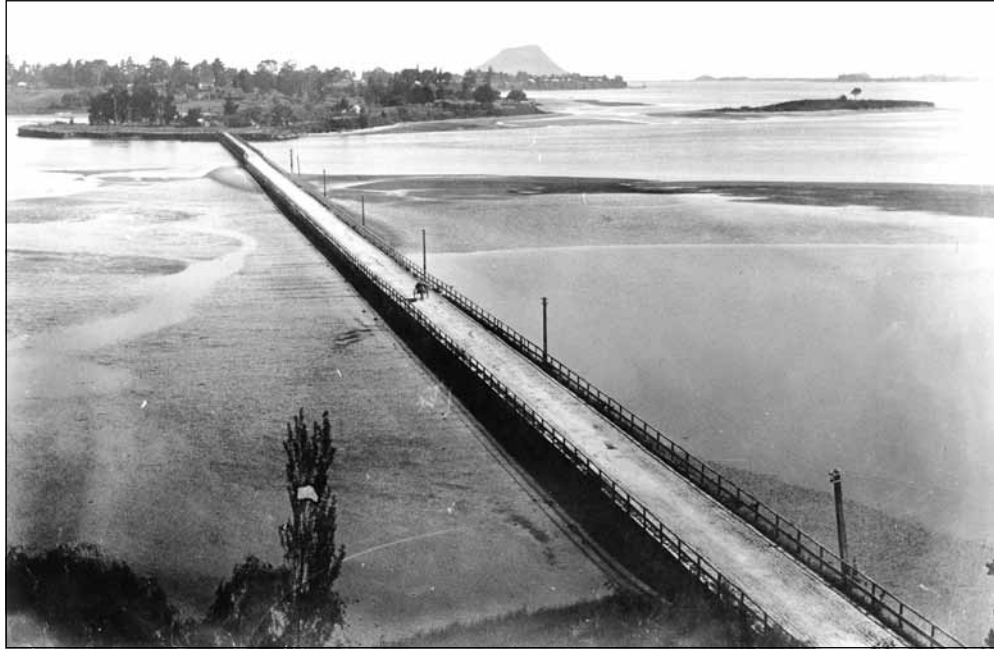


Figure 7.12: Hairini Bridge circa 1910

Photographer unknown. Reproduced courtesy of Tauranga City Libraries (99–1196).

by international shipping, such as a new starfish that is damaging mussel beds.<sup>403</sup> Mawete Gardiner, too, mentioned the ‘foreign sea slugs which . . . now seem to be everywhere’.<sup>404</sup> Many witnesses singled out the spread of mangroves as a sign of an unbalanced ecology. They believed mangroves destroyed habitat for fisheries as well as cutting off access to them.<sup>405</sup> Environment Bay of Plenty data confirms that the extent of land covered in mangroves in Tauranga Harbour has doubled in the last 50 years.<sup>406</sup>

Witnesses said that Māori concerns, which were based on their own observations and local knowledge, were typically ignored, while precedence was given to scientific evidence. Hauata Palmer argued that

Everything that happens down here affects the upper reaches of the Harbour, the other end. The Port development, the Sulphur Point reclamation and channel deepening. Those are the main things. You know, the annoying thing is that they keep saying there’s no scientific proof of this. But we know. We can see it.<sup>407</sup>

403. Document R26, p14

404. Document R19, p7

405. Waraki Paki, brief of evidence, undated (doc J11), p3

406. Document T3, p25

407. Hauata Palmer (doc A50, p48)

Kihi Ngatai recalled that, in debate over the effects of the proposed harbour bridge, he was ‘told by a Professor that even though the pipi bed would be temporarily disrupted, it would return’. But, he said, there is one old kaumatua living at Mount Maunganui who goes to check on the pipi bed every day: ‘it has never returned’.<sup>408</sup> Keni Piahana told us that councils regard customary knowledge as ‘a curiosity’; this, he claimed, ‘truncates the continued expression of Rangatiratanga, because the customary knowledge base will lose currency and disappear’.<sup>409</sup> Anthony Fisher, of Ngāi Tūkairangi summarised the claimants’ position:

My hapu is of the very strong view that the railway bridges, harbour bridges, road bridges, causeways, port development, and channel widening, have altered the tidal flow characteristics of the harbour and have been the reason for the disappearance of titiko from te tahuna o Waipu, the disappearance of tuangi and ureroa beds, the proliferation of mangrove growth in estuaries within the harbour, and the appearance of mangroves in te tahuna o Waipu. Our past objections to port and harbour developments on the grounds that they contribute to this have been countered by volumes of data from scientific and academic experts that is always accepted. But the titiko, tuangi, ureroa, the channels and drains used by whanau of Ngāi Tūkairangi in which to store their kaimoana after it had been harvested from mataitai areas, have gone.<sup>410</sup>

Tangata whenua witnesses also described damage to the customary fishery in freshwater streams and rivers. We have already recorded the comments of Kiakino Paraire, of Ngā Pōtiki, about how the discharge of ‘slag and slush’ from the Kaitimako quarry had affected fish stocks in the Waitao Stream.<sup>411</sup> Hinenui Cooper noted that while the stream could once cater for steamboats, it was now possible to wade across it.<sup>412</sup> That evidence was supported by the observations of Pikowai Ohia and Hone Newman, of Ngāti Pūkenga, who noted discolouration of the water and a build-up of silt, particularly around the Waitao bridge and at the mouth of the stream. Silting at the mouth, said Newman, had affected the depth of the stream, causing the water to fan out into about six shallow strands instead of a single, deeper, flow. Like several other witnesses, he said there were now nowhere near as many fish in the stream.<sup>413</sup> Nevertheless, Hinenui Cooper noted that the river still retains a greater diversity of native fish species than any other that NIWA monitors.<sup>414</sup>

Whareoteriri Rahiri, of Waitaha, pointed to similar effects on the Kopuaroa Stream from Fulton Hogan’s Poplar Lane quarry and on the Wairākei River from drainage works and

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408. Document Q13, p 13

409. Document G26, p 14

410. Anthony Fisher, brief of evidence, undated (doc J14), p 10

411. Document E3, p 8

412. Robyn Hinenui Cooper, brief of evidence, 26 June 2006 (doc R28), p 17

413. Pikowai Ohia, brief of evidence, 22 May 2006 (doc Q25), p 3; Hone William Newman, brief of evidence, 26 June 2006 (doc R42), pp 6–7

414. Document R28, p 17

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residential development. Customary fishing in both those waterways, as well the Atuaroa Stream, is now significantly diminished, and his relatives from Ngāi Tamarāwaho no longer come to gather eels for Kingitanga celebrations.<sup>415</sup> Eddie Tiepa Bluegum remembered playing as a child in the Rereatukahia River – learning to swim, drinking the water without fear, and catching many kinds of fish. Recently, though, the water has become polluted with ‘green sludge’, strange weeds, agricultural runoff, and spray drift. The fishery has dramatically declined, and the area is known to all as ‘Stink Bridge’.<sup>416</sup>

Witnesses described their sadness that the children of Tauranga Moana no longer experience the plenty of their ancestors. People’s association with the ancestral landscape has been lost, while traditional activities such as fishing and making nets, once undertaken as a community, have declined. As Heeni Murray of Matakana Island recalled:

the process of gathering kai moana had a strong whanau element to it . . . We all went out on fishing expeditions as a whanau and as a community. It was great fun for the younger ones, helping to set and haul in the nets. There were the horse riders, driving the fish up the channel into the waiting nets, and there were others tramping and spearing flounders. These episodes are just a memory for us now.<sup>417</sup>

With the loss of traditional foods, and traditional activities, it becomes harder to maintain ahi kā, and to hold the links between previous and future generations. Gordon Te Reo Hau Ranui expressed sentiments echoed by other witnesses:

It’s really sad because that’s what I grew up with, but I can’t give that to my grandchildren. I can’t pass the right to get kaimoana from Tauranga Moana to them, they can only read about it. Our generation is the last one to witness all the dramatic changes from then to now.<sup>418</sup>

This perhaps lends another meaning to the whakataukī ‘E kore te patiki e hoki ki tona puehu’ (The flounder will not return to its waters once disturbed).<sup>419</sup> While kaimoana is perhaps not so necessary today as a source of sustenance, it is clear that Tauranga Māori desire to retain their customary fisheries as a key component of cultural identity, binding their communities within their ancestral landscapes. Keni Piahana told us that:

The taiapure provided more than physical sustenance. It is a benchmark of the mana and pride for ahi kaa whanau. Knowledge that you are blessed with a natural resource that can sustain te hau kainga and manuhiri tuarangi alike, has entrenched a close personal and

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415. Document s35, pp 9–11

416. Document r8, pp 4, 6

417. Document j22, p 11

418. Document Q7, p 5

419. Document G26, p 8

cultural association with the estuary and the responsibility of kaitiakitanga. Care must be taken not to equate these associations as amenity or aesthetic features. They are central to the life and custom of tangata kaitiaki.<sup>420</sup>

In summary, the claimants' view is that the Government's past mismanagement is responsible for their depleted fisheries. Port development was often singled out as a principal cause of environmental loss and degradation. Moreover, there was a strong perception that in developing the port, the Government and local authorities had little regard for Māori concerns over the effects on fisheries. The claimants argue that if they had retained the authority to control their fisheries, they could and would have ensured they were managed in a sustainable way.

### (3) *Modern management of customary fisheries*

Whatever the case historically, however, the modern management regime for New Zealand fisheries seeks to maintain a sustainable fishery. Since the late 1980s, a quota management system has been in place. To ensure sustainability there is also provision for the Government to set a total allowable catch for each species, made up of 'all the catch from any source that can be taken, *including customary*, recreational, commercial, illegal fishing and fish that might be killed by fishing but not landed' (emphasis added).<sup>421</sup> This provision implicitly acknowledges the Crown's responsibility for protecting the customary fishery, as a contributing factor to ensuring a sustainable national fishery.

The foundation for Māori involvement in the modern management regime was laid by the Māori Fisheries Act 1989, which aimed to 'make better provision for the recognition of Maori fishing rights secured by the Treaty of Waitangi'.<sup>422</sup> This Act provided for taiāpure (local fisheries) to be declared. These allow a management committee, nominated by the local Māori community, to regulate all fishing activities within the taiāpure. Establishing a taiāpure is complex and time-consuming, involving ministerial decisions and consideration by a tribunal of the Māori Land Court. Historically, taiāpure have proven very difficult to establish.<sup>423</sup> For example, Matakana Māori applied to establish a taiāpure covering the waters within one kilometre of the island soon after the 1989 legislation, but they were unsuccessful.<sup>424</sup>

The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, which finally settled all Māori claims to commercial fishing, acknowledged the need for improved provisions for

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420. Ibid, p 7

421. Terence William Lynch, brief of evidence on behalf of the Ministry of Fisheries, 2 October 2006 (doc T13), pp 4–5

422. Maori Fisheries Act 1989, long title

423. Document T13, pp 7–9

424. Document A20, p 29

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customary fishing. The result, in the North Island, was the Fisheries (Kaimoana Customary Fishing) Regulations 1998. It is the adequacy of these regulations to give effect to the Treaty interests of Tauranga Māori with which we are now concerned.

These regulations provide for tangata whenua to manage customary fishing within their iwi boundaries by appointing kaitiaki (either individuals or groups). In 2000, Tauranga iwi established the Tauranga Moana Customary Fisheries Committee to give effect to these regulations. The committee consists of two representatives from each of Ngāi Te Rangi, Ngāti Ranginui, and Ngāti Pūkenga. Each committee member is a kaitiaki, with the power to issue authorisations to tangata whenua to gather kaimoana for customary purposes such as hui and tangi. Committee chairman Brian Dickson acknowledged that these regulations have removed problems with the previous regulations established in the 1980s that allowed kaumātua to issue authorisations for areas beyond their rohe.<sup>425</sup>

Tangata whenua can also apply to establish mātaihai reserves within their rohe. In these reserves, tangata whenua have the authority to manage not just customary fishing, but all non-commercial fishing, through the regulations or by-laws they choose to enact. Commercial fishing is generally banned within mātaihai.<sup>426</sup> To establish a mātaihai reserve, application must be made to the Ministry of Fisheries, the application must be publicly notified, and the Ministry and tangata whenua must together meet with the local community.<sup>427</sup> Kaitiaki have comprehensive powers to regulate which species can be fished for, where they can be taken from, the bag and size limits, the methods allowed, and any other matters considered necessary for the 'sustainable utilisation of fisheries resources'.<sup>428</sup>

Tauranga Māori have established one mātaihai reserve. This covers Mauao, the waters around Moturiki and Motuhua islands, and part of the harbour entrance at Mount Maunganui. They have also imposed a rāhui on the taking of green-lipped mussels within part of the reserve, and the Ministry have closed this area to mussel harvesting.<sup>429</sup>

We heard no evidence that these legislative provisions were in principle inadequate to give effect to the rangatiratanga of Tauranga Māori over customary fishing. Customary fishing is, rightly, subject to the overriding principle of sustainability, but the Crown cannot restrict the quantity of fish being taken for customary purposes 'provided the level of harvest is sustainable and all fishing is non-commercial in nature'.<sup>430</sup> In particular, iwi have the ability to exercise their rangatiratanga over mātaihai as they see fit.

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425. Document R26, p 6

426. Document T13, pp 6–7

427. Ibid, pp 8–9, 15

428. Ibid, pp 17–18

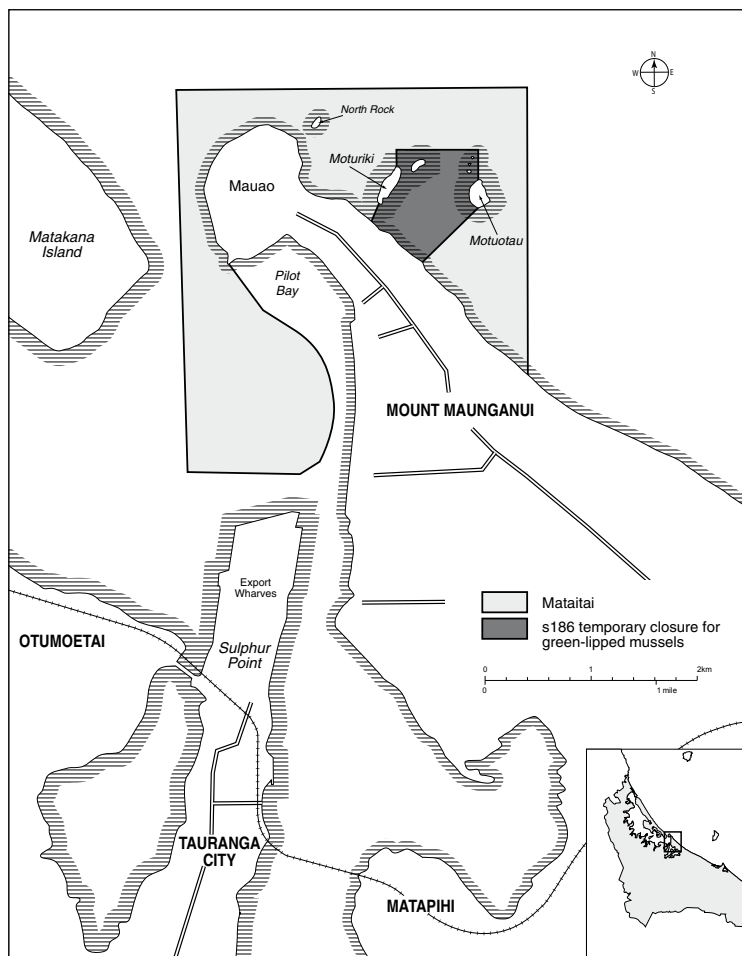
429. Document R26, p 3. Brian Dickson, speaking for Ngāi Te Rangi, referred to a 'mahinga mataihai' having been established, but this does not appear to have become an official mātaihai reserve until 2008: Ministry of Fisheries, 'Mt Maunganui and Tauranga Harbour Mataihai', Ministry of Fisheries, <http://www.fish.govt.nz/en-nz/Press/Press+Releases+2008/Augusto8/Mt+Maunganui+and+Tauranga+Harbour+mataihai.htm> (accessed 1 July 2010).

430. Document T13, p 4



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Map 7.6: Mātaitai reserve, and temporary closure for mussels

Nevertheless, Brian Dickson did express concerns with the operation of the regulatory regime, chiefly in terms of administrative and resourcing issues. Mr Dickson argued that establishing mātaitai was 'laborious, time consuming and difficult'. He believed that asking for submissions on the application for the mātaitai before undertaking any public relations exercise was a process that 'set us up to fail'. He also identified a lack of funding to inform and educate the public, and thereby reduce opposition to the establishment of mātaitai reserves.<sup>431</sup> There was inadequate funding for the committee's activities, which include meetings, training, the development of management plans, consultation with tangata whenua, and research into traditional fishing. 'People do all the work for free', he said. In particular, the committee had been unable, in any of the last four quarters, to give the Ministry the

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431. Document R26, pp 9–11

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data on the extent of customary fishing it needs to accurately determine the sustainable catch for fisheries.<sup>432</sup>

Terrence Lynch, of the Ministry of Fisheries, told us that the Ministry has made efforts to respond to such concerns. Developments planned or already underway at the time of hearing included:

- ▶ the setting up of regional fisheries forums, to provide an opportunity for iwi and hapū to meet with one another and with the Ministry, share ideas and information, and develop joint policies and plans;
- ▶ the appointment of a pou hononga (relationship facilitator) to work with each regional forum;
- ▶ the recruitment of a pou takawaenga (extension officer) for each forum – or possibly some other arrangement proposed by the tangata whenua – to assist iwi and hapū in carrying out their role;
- ▶ the development of an NZQA-accredited training programme for kaitiaki, covering matters relating to the compliance side of the role;<sup>433</sup> and
- ▶ steps to streamline the data collection process.<sup>434</sup>

We note, too, Mr Lynch's comments that the Ministry of Fisheries lacks the capacity to do everything it might wish to assist tangata whenua.<sup>435</sup> We are heartened, however, that the Ministry has been reviewing the situation and is aware that 'improvements could and should be made to better reflect the legal obligations on the Ministry arising from the Fisheries Deed of Settlement and the principles of the Treaty of Waitangi'.<sup>436</sup> We encourage the Crown and claimants to continue to work together to resolve outstanding issues, particularly in relation to strengthening iwi and hapū capacity and resourcing.

**(4) Conclusions**

Until the modern regime, there were very few legislative provisions that recognised a distinctive Māori interest in fishing. While from 1900 to 1962 provisions existed whereby Māori could apply to establish customary reserves, these were never actually created – despite requests from many iwi, including Tauranga Māori. In petitioning the Crown about fishing and shellfishing in the 1920s, 1940s, and 1950s, Tauranga Māori made it abundantly clear that they then used kaimoana for regular sustenance rather than merely as a recreational source of food. Official policy was, however, to refuse all requests for exclusive control over fisheries.

The Crown did introduce measures to limit trawling and seining from time to time, yet it gave no particular consideration to Māori needs or rights with respect to their customary

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432. Document R26, pp 8–9, 12

433. Document T13, pp 20–23

434. Ibid, pp 27–28

435. Ibid, p 22

436. Ibid, p 19

fishery. Rather, it positioned Māori as one interest group among many.<sup>437</sup> Overall, very little recognition seems to have been given to the fact that many Tauranga Māori historically relied on their customary fisheries for sustenance. Though Māori do not now depend on kaimoana for survival, gathering kaimoana remains a key aspect of their traditional culture, which is entitled to the Crown's active protection. It was clear from the evidence that Tauranga Māori have a strong desire to sustain and nurture this aspect of their culture as a taonga tuku iho.

In assessing the adequacy of the fishing regulations we note, first and foremost, the difficulty experienced in establishing taiāpure and mātaītai. The record is: no taiāpure, and one mātaītai, in 20 years.<sup>438</sup> Further, despite the improvements in providing for their participation in fisheries management, tangata whenua believe that fisheries continue to decline. Keni Piahana, of Ngāi Te Ahi, eloquently conveyed to us, for example, his people's fears for Waimapu Estuary:

[U]nder current management approaches, there is an incremental movement towards an empty shell of an estuary. A healthy and vibrant fishery is a pivotal element of cultural integrity. [To be] [u]nable to meet manuhiri and marae requirements is to be a pauper in one's own land. This is hardly consistent with the status and position of tangata whenua, to be kaitiaki of a barren resource . . . There is an associated sense of whakama, not being able to express manaakitanga at an appropriate level and in an appropriate way.<sup>439</sup>

For of course there are many other human activities that contribute to the state of fisheries besides the taking of fish. Jason Murray, of Matakana Island, said his concerns about the future of marine life included not only overfishing, but also waste and sewage disposal, and nutrient runoff. He predicted:

it will only be a matter of time before these precious resources [marine life] will be too toxic for human consumption and thus the mana of the people and the mauri of these resources will be severely degraded . . .<sup>440</sup>

Most of the activities he describes take place on land, and are regulated by planning legislation. Until comparatively recently, such legislation paid little attention to the distinctive relationships between Māori and their environment, and their rangatiratanga over it – a failure of which we were frequently reminded by claimants.

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437. Document D7, pp 104–113

438. We note that the mātaītai may now be under threat. At the time of finalising this report, plans to undertake dredging to deepen and widen the port's shipping channels appear likely to affect part of the mātaītai reserve, on the western side of Mauao: Graham Skellern, 'Port has green light for \$50m dredging', *Bay of Plenty Times*, <http://www.bayofplentytimes.co.nz/local/news/port-has-green-light-for-50m-dredging/3915275/> (accessed 6 July 2010).

439. Document G26, pp 12–13

440. Jason Conan Murray, brief of evidence, 17 June 2006 (doc R47), p 9

### 7.6 THE CURRENT RESOURCE MANAGEMENT REGIME: CAN MĀORI NOW EXERCISE RANGATIRATANGA AND KAITIAKITANGA?

We have seen how Tauranga Māori have been dispossessed of their harbour, waterways, foreshores, and much of their lands. As this has happened, their ability to exercise tino rangatiratanga and kaitiakitanga in their ancestral landscapes has been limited to inclusion in the development of planning and resource management regimes. We have discussed, in chapters 5 and 6 as well as here, the very limited provisions made for Māori interests and participation in planning legislation before the passing of the Resource Management Act 1991. We saw there that the Crown was in clear breach of the Treaty with its town and country planning legislation before 1991, which did not provide for Māori to exercise rangatiratanga or kaitiakitanga.

Māori held high hopes that, under the modern resource management regime introduced with the Resource Management Act, they might once more exercise rangatiratanga and kaitiakitanga. However, the claimants allege that this has not occurred. Some are also disappointed that the Crown, through the Act, has failed to prevent ongoing pollution and degradation of the environment. The Crown, for its part, argues that the Act is consistent with Treaty principles, and that the quality of the environment is now improving.<sup>441</sup>

In weighing up these differing positions, we must consider the following:

- ▶ Do the Crown's legislative regimes, especially the Resource Management Act, recognise Māori as Treaty partners, and provide mechanisms through which Tauranga Māori can exercise rangatiratanga and kaitiakitanga in the management of their taonga?
- ▶ When delegating authority for planning the future of Tauranga, is the Crown ensuring that local authorities fulfil the Crown's Treaty obligations?
- ▶ Is the Crown monitoring the performance of local authorities in this respect, and moving to address any issues that arise?
- ▶ Is the quality of the natural environment improving or continuing to worsen under current management regimes?

#### 7.6.1 The Resource Management Act

The Resource Management Act, though amended several times, has remained the core of environmental law in New Zealand since its enactment in 1991. Part II of the Act defines the Act's purpose as 'to promote the sustainable management of natural and physical resources'. A number of the Act's core part II provisions are concerned with protecting Māori interests in the natural environment and in cultural heritage. The Act therefore recognises and protects the entwined natural and cultural environments that together comprise the ancestral landscape and taonga of Tauranga tangata whenua. The distinction between the natural and

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441. Document U29, p13

cultural environment is an artificial separation for Māori. In our view, one of the strengths of the Act is that it incorporates management of both within an overarching framework of sustainability.

In terms of the management of the natural environment, the Act contains various provisions that address Māori interests. In exercising the powers and functions delegated to them under the Act, local authorities are required to provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga as a matter of national importance (section 6(e)). Since 2004 they have similarly been required to provide for the protection of recognised customary activities (section 6(g)).

Māori philosophies of resource management are also incorporated into the Act. Local authorities must 'have particular regard to' kaitiakitanga, defined (since 1997) as 'the exercise of guardianship' and including 'the ethic of stewardship' (section 7(a)). Finally, local authorities must 'take into account the principles of the Treaty of Waitangi' when managing the use, development and protection of natural and physical resources (section 8).

Other sections of the Act set out aspects of the statutory relationship between Māori and local bodies in managing the natural and cultural environment. Local bodies must always consult Māori when preparing or changing any planning documents, although consultation is not compulsory when considering applications for resource consent.<sup>442</sup> In the original Act, they were also required when preparing or changing policy statements or plans to 'have regard to any relevant planning document recognised by an iwi authority, and lodged with the council' and retain records of these plans. A 2003 amendment strengthened this requirement, so that regional and district councils must, now, 'take into account' these documents.<sup>443</sup>

The importance of consultation between local authorities and Māori was reiterated in the Local Government Act 2002. This Act requires a local authority to 'provide opportunities for Maori to contribute to its decision-making processes' and 'consider ways in which it may foster the development of Maori capacity to contribute to the decision-making processes', and to 'ensure that it has in place processes for consulting with Maori'.<sup>444</sup>

In addition to the provisions in the Resource Management Act, the Minister may choose to give further direction to local authorities, by issuing national policy statements on 'anything which is significant in terms of section 8 (Treaty of Waitangi)'. All regional and district planning documents must give effect to such statements.<sup>445</sup> A New Zealand coastal policy statement, which must be issued, may also provide policies for 'the protection of the characteristics of the coastal environment of special value to the tangata whenua including waahi tapu, tauranga waka, mahinga maataitai, and taonga raranga'.<sup>446</sup>

442. Resource Management Act 1991, sch 1, s3(1)(d); Resource Management Act, s36A

443. Ibid, ss 61(2A)(a), 66(2A)(a), 74(2A)(a)

444. Local Government Act 2002, ss 14(1)(d), 81(b), 82(2)

445. Resource Management Act, s 45(2)(h)

446. Ibid, s58(b)

Finally, section 33 of the Resource Management Act provides that local authorities may transfer any of their ‘functions, powers, or duties’ under the Act to another public authority, including an iwi authority. This may occur where the iwi authority represents ‘the appropriate community of interest’ for that function, has special expertise, and where it would be efficient to do so. The Minister must be notified before any transfer takes place, and the public consulted. The local authority retains the power to revoke the transfer at any time.<sup>447</sup> Alternatively, under a 2005 amendment, local authorities can choose to institute, through section 36, a management agreement with iwi or hapū so that powers and duties are exercised jointly.<sup>448</sup>

What impact has the Resource Management Act made in Tauranga? Claimants acknowledged that the Act has improved the quality of environmental management. There was no dispute that Environment Bay of Plenty, with whom much of the responsibility in this area now lies, has made significant progress under the Act. The council’s responsibilities include controlling the pollution of air and water; pest animals and plants; coastal management; and environmental monitoring. It issues policy statements and plans that give effect to these responsibilities, and the plans of district councils must not be inconsistent with these regional plans. The council is also responsible for issuing resource consents for many activities involving the uses or discharges into air, land and water. They monitor compliance with resource consents, and provide overall monitoring of the state of the environment.

We heard substantial evidence from Paul Dell (group manager, Regulation Resource Management) about the wide-ranging measures Environment Bay of Plenty has taken to improve environmental quality in Tauranga Moana – for example, its comprehensive campaign to clean up Tauranga Harbour, so long the focus of Māori concern. Under sustained pressure from Environment Bay of Plenty, all the local council sewerage schemes have been upgraded, and now treat effluent to a very high quality. All schemes use secondary treatment (and in the case of Katikati, tertiary treatment), disinfection (except for wastewater from Mount Maunganui), and wetland filtration systems, before discharging through pipelines to offshore seas.<sup>449</sup> This level of treatment is very high compared with most treatment schemes in New Zealand.<sup>450</sup>

Agricultural discharges into streams flowing into the harbour have also been substantially reduced. All discharges from piggeries have been eliminated, and over 80 per cent of dairy farms in the harbour catchment now discharge onto land.<sup>451</sup> A regional coastal environmental plan has set water-quality standards, and all non-complying discharges require resource consent. Environment Bay of Plenty has prosecuted several companies for dis-

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447. Resource Management Act, s33

448. Ibid, s36B–E

449. Document T3, pp 19–20

450. SmartGrowth, ‘Wastewater Investigations – Overview Report on Issue of Land Application versus Ocean Discharge’, May 2003, p 4

451. Document T3, pp 16–17



charging contaminants to both water and air in breach of resource consent.<sup>452</sup> In addition, Environment Bay of Plenty assists a growing number of community groups who care for estuaries, streams, and parts of the coast, helping them to remove rubbish, noxious weeds, and mangroves, and to revegetate native plants.<sup>453</sup>

Environment Bay of Plenty has monitored water quality at sites in both the harbour and surrounding streams since 1990.<sup>454</sup> Tauranga Harbour now consistently complies with the water standards required for bathing.<sup>455</sup> Shellfish have improved in quality with respect to bacterial contamination since monitoring began.<sup>456</sup> Some concerns remain, however, with the water quality of rivers and streams, largely because of agricultural runoff. Significant areas of stream margins still need to be protected from stock, and as Mr Dell pointed out, runoff from pastoral farming will always contaminate waterways at times of high rainfall.<sup>457</sup>

Environment Bay of Plenty also provides the overall regional policy and planning that is meant to shape district planning. Regional and district plans must give effect to the regional policy statement.<sup>458</sup> Further, since a 2005 amendment, district plans cannot be inconsistent with regional plans.<sup>459</sup> According to Antoine Coffin, Environment Bay of Plenty consulted widely with Māori in preparing its first policies and plans.<sup>460</sup> Our inspection of the Environment Bay of Plenty regional policy statement and plans (including the regional water and land plan, regional coastal environment plan, and air plan) has satisfied us that they are making considerable and commendable provision for the concerns and values of Tauranga Māori.

However, it is important to note that there was a considerable delay in producing the first regional plan, which did not become operative until December 1999. There has been a comparatively short space of time for this planning to have any effect on district planning, and in turn to be of benefit to Tauranga Māori.

### 7.6.2 Claimant concerns

Counsel for Ngāi Tūkairangi acknowledged that, '[i]t would be churlish not to acknowledge the good work carried out by EBOP [Environment Bay of Plenty] in improving water quality since 1990'.<sup>461</sup> Claimants also acknowledged that Tauranga City Council and Environment

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452. Ibid, pp 10–11, 18–19

453. Ibid, p 13

454. Ibid, pp 18, 22

455. Environment Bay of Plenty, *Tauranga Harbour Integrated Management Strategy* (Whakatāne: Environment Bay of Plenty, 2006) (doc T39), p 16

456. Document T3, p 23; transcript 4.5, p 16

457. Document T39, pp 16–17; transcript 4.5, p 23

458. Resource Management Act 1991, s 75(3)(c)

459. Ibid, s 75(4)(b)

460. Document s7, p 18

461. Document U12, p 73

Bay of Plenty have been exemplars of ‘best practice’ in providing for Māori representation and engagement, at least when compared to other councils around the country.<sup>462</sup> This is demonstrated, for example, by Tauranga City Council’s extensive consultation and engagement with tangata whenua over proposed upgrades to Tauranga’s wastewater system (the southern pipeline) before resource consent applications were lodged.<sup>463</sup>

Nevertheless, some claimant concerns remained about the overall quality of the resource management regime’s operation in Tauranga and about the Crown’s provisions for their participation in that regime. Some claimants continue to be alarmed by ongoing and recent pollution at specific sites. Pirirākau, for example, were concerned about primitive sewerage systems at Ōmokoroa Beach and Te Puna.<sup>464</sup> On the basis of the evidence provided however, we are satisfied that Environment Bay of Plenty is aware of these problems and has processes in hand to solve them.<sup>465</sup>

#### **(1) Wastewater disposal**

A more general concern relates to the fact that local authorities have continued to dispose of wastewater into the ocean, over and against the wishes of Tauranga Māori. Residents of Matakana Island, for example, were deeply involved in the prolonged debate in the 1990s over how to upgrade the Katikati sewerage scheme; they continually reiterated their view that it was culturally unacceptable to discharge human effluent or sewage wastewater into the ocean, regardless of the quality of treatment provided.<sup>466</sup> These concerns were mirrored elsewhere – for example, in the Ngāi Te Rangi iwi resource management plan 1995 and the combined tangata whenua report to SmartGrowth, both of which sought to have land-based treatment of sewage adopted throughout Tauranga Moana.<sup>467</sup>

The local authorities have gone some way towards meeting these concerns by installing wetland filtration systems.<sup>468</sup> They have also upgraded their treatment systems to a high standard, and have thoroughly investigated whether adopting land-based alternatives is technically feasible and environmentally sustainable.<sup>469</sup> But they have not adopted the fully land-based treatment and disposal desired by Tauranga Māori.

We accept that it is difficult for local authorities to contemplate adopting land-based sewerage treatment on a large scale, since it is extremely costly, and can present significant

462. Document U31, p 43

463. Barry Somers, brief of evidence, 27 September 2006 (doc T6); Neil Te Kani, brief of evidence, undated (doc R1), pp 21–26

464. Document U16, pp 11–12

465. Transcript 4.5, pp 22–23

466. Document B4, pp 105–112

467. Document S7, pp 55–58, 62–63

468. Buddy Mikaere, brief of evidence, 25 September 2006 (doc T9), p 3

469. Document T4, pp 10–11; doc 4.7, pp 120–21. We note that the councils have commissioned an independent report on the feasibility of land-based wastewater disposal. SmartGrowth, ‘Wastewater Investigations: Overview Report on Issue of Land Application Versus Ocean Discharge’, May 2003. This study concluded that land disposal systems in the Tauranga area carry increased environmental risks, and much higher financial costs.

environmental problems of its own.<sup>470</sup> For example, a proposal to dispose sewage to land in Katikati was estimated in 1996 to cost each ratepayer \$800 per year, \$200 more than continued use of the Matakana outfall.<sup>471</sup>

Equally, however, it is clearly very far from ideal that the consistently stated position of Tauranga Māori about a matter of profound cultural significance cannot be accommodated.

### **(2) Engagement in decision-making and planning**

The claimants' primary concerns were the perceived failings of authorities, under the Resource Management Act, to engage with Māori as decision-makers and active participants in environmental planning and management. Claimants repeatedly told us that their engagement in the planning process has been largely reactive, aimed at protecting their interests in the face of development pressure. They said their involvement was exhausting and expensive, but had little or no effect on outcomes.

Such disappointments partly stem from the fact that Māori expectations for the Act were very high. Antoine Coffin described the initial response to it as:

a huge sigh of relief amongst tangata whenua . . . [there were] great hopes and aspirations in terms of involvement and participation in resource management processes. Particularly with as a matter of national importance relationship of Maori with ancestral lands etc, in sections 7A and kaitiakitanga, seeing those Maori provisions there . . . I think there was certainly a high expectation that things would suddenly change.<sup>472</sup>

Such high expectations of immediate change were perhaps inevitably going to be disappointed. In the event, newly reconstituted councils in Tauranga struggled to come to terms with the complex requirements of the Act. The first district plan for the (then) Tauranga District Council prepared under the Act was an amalgam of transitional plans prepared by the Mount Maunganui Borough, Tauranga City Council and parts of Tauranga County Council; it was not notified until 1997, and did not become operative, following submissions and appeals, until 2003. Similarly, the Western Bay of Plenty district plan did not become operative until 2002.<sup>473</sup> It is also clear to us that iwi and hapū, too, initially struggled to come to terms with their potential roles under the new legislation. We find these difficulties unsurprising, given the distinct lack of policy direction given to councils regarding how better to accommodate Māori aspirations and values under the new legislation, and the lack of funding from the Crown for iwi and hapū participation.

Tauranga Māori had limited involvement in the development of these initial district plans prepared under the Resource Management Act.<sup>474</sup> According to Andrew Ralph, the

470. Document 4.7, pp 120–121; doc s7, pp 55–56

471. Document B4, p 118

472. Quoted in doc v5(a), p 29

473. Andrew John Ralph, brief of evidence, 28 September 2006 (doc T7), p 4

474. Ibid, pp 4–5

first plan for Tauranga ‘reflects the era in which it was prepared (mid 1990’s) . . . [and] can be described as fairly “laissez faire” – that is to say enabling development within a broad environmental management framework.’<sup>475</sup> We do note that more recent plan changes, such as that for Wairākei, have involved Māori to a greater extent, and Māori values have shaped planning so that, for example, sightlines to Mauao and the Pāpāmoa hills are preserved.<sup>476</sup>

Nevertheless, in some especially key areas, councils have not succeeded in meeting Māori expectations, even in recent times. The claimants say councils still ignore the key provisions in the law for safeguarding their rangatiratanga. According to Keni Piahana, for example, Ngāi Te Ahi see section 33 of the Resource Management Act, allowing the transfer of powers to iwi, as ‘a direct way to model customary practice and balance the mutual benefits envisaged under shared citizenship.’<sup>477</sup> However we were told that councils have never used this provision. We were also told that councils have been reluctant to operate any joint management regimes with iwi (since 2005 provided for under section 36 of the Act).

When, for example, management of Mauao was reviewed in 1995, Ngāi Te Rangi outlined to the Tauranga City Council the significance of the mountain to Tauranga Māori, and highlighted the importance of extending the Treaty principle of partnership to decision-making over this ancestral site. They proposed that representatives of Ngāi Te Rangi, Ngāti Ranginui, and Ngāti Pūkenga form a joint management board with Tauranga City Council and the Department of Conservation for the management of Mauao. In the draft revised Mauao management plan, council planners recommended to the council that this proposal be accepted. Yet the Tauranga City Council found this proposal unacceptable. According to Anthony Fisher, the council argued that other community groups could equally claim a right to representation.<sup>478</sup>

In 2008, after our hearings, Mauao was returned to Tauranga Māori by special legislation.<sup>479</sup> All Tauranga iwi are now represented on the council’s Mauao project steering group that will have management oversight. However, Tauranga City Council retains overall management of Mauao; Tauranga Māori are yet to realise their aspirations for management of Mauao.

Elsewhere there are some small signs of movement towards Māori being included in management. For example, as discussed in chapter 6, we heard considerable evidence about the involvement of tangata whenua, at both governance and management levels, in the SmartGrowth strategy – the principal guide for long-term forward planning in the Tauranga area. The local authorities are to be commended for recognising the right of tangata whenua to play this role in shaping policy directions in their rohe over the next 50 years. We note

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475. Document T7, p 5

476. Ibid, pp 6–7

477. Document G26, p 20

478. Anthony Fisher, brief of evidence, undated (doc R3), pp18–20

479. Freehold title was vested in the Mauao Trust, which contains representatives of Ngāi Te Rangi, Ngāti Ranginui, and Ngāti Pūkenga, by the Mauao Historic Reserve Vesting Act 2008.

also that the recently established Pāpāmoa Hills Cultural Heritage Park (discussed in the next chapter) is owned by Environment Bay of Plenty, but managed jointly with Te Uepū, a caucus of tangata whenua, who share responsibility for the park's governance.<sup>480</sup>

Aside from assuming a management function, close engagement with planning processes is potentially the most powerful means that the Crown has provided for Māori to exercise rangatiratanga in environmental management. Like all members of the public, Māori can participate in the development of district plans and policies by making submissions to the proposed district plan which governs all land-based development. But according to Antoine Coffin, tangata whenua input into plans has to date been 'sporadic and reactionary'.<sup>481</sup> Though data is scarce, it seems clear that Tauranga Māori have had little input to plans as ordinary members of the community. Keni Piahana, of Ngāi Te Ahi, told us that in one case, individual Māori had contributed perhaps as few as four of over 300 annual plan submissions to Tauranga District Council.<sup>482</sup>

Iwi and hapū can also participate in environmental planning by developing their own planning documents, commonly known as iwi management plans. As noted, since 2003, local authorities have had a statutory obligation to 'take into account' these plans (previously they had only to 'have regard to' these plans).<sup>483</sup> The courts have determined that the requirement to 'take into account' necessarily involves weighing the relevant factors being considered; effecting a balance between them appropriate to the circumstances; and being able to show that this has been done. In sum, council decisions must be demonstrably affected by the requirement to take account of iwi management plans.<sup>484</sup>

Tauranga iwi and hapū have produced a range of iwi management plans, largely in the late 1990s.<sup>485</sup> At the time of our hearings, some groups, such as Ngā Pōtiki and Ngāti Ranginui, had not yet completed proposed iwi management plans. A measure of funding was provided to them for this purpose by, respectively, the Ministry for the Environment and the (then) Tauranga District Council.<sup>486</sup> We did not hear how much this funding amounted to, but significant questions remained over whether iwi were sufficiently resourced to produce management plans, and whether these plans were being adequately taken into account by councils.

Te Pio Kawe, the tū pakari advisor to the Combined Tangata Whenua Forum on SmartGrowth, stressed the importance of iwi management plans and the need for councils to help fund them:

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480. Environment Bay of Plenty, Papamoa Hills Regional Park Management Plan, Environmental Report 2006/18, July 2007, pp 1, 43

481. Document T23, para 12

482. Document G26, pp 15–16

483. Resource Management Act 1991, ss 61, 66, 74

484. *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 at 235–236; *Haddon v Auckland Regional Council* [1994] NZRMA 49 at 61

485. Document s7, p 45

486. Ibid

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In order to participate in these [planning] processes, the iwi themselves have to have their own plan in place. Having a plan comes down to funding. Therefore, the Council needs to commit some funding . . .<sup>487</sup>

In 2004, the SmartGrowth strategy deemed the development of iwi and hapū management plans a high priority. It costed their development at \$100,000 annually. It listed the tū pakari advisor as lead agency for their development, with all the local authorities and the Ministry for the Environment to be support agencies.<sup>488</sup> Crucially, the SmartGrowth strategy also suggested that '[f]ollowing the formulation of hapu management plans, there may be opportunities to provide for direct involvement of tangata whenua in decision making . . . under section 33.'<sup>489</sup> If, as this implies, councils consider iwi management plans to be prerequisites for tangata whenua to assume direct involvement in decision-making, then their significance to the exercise of rangatiratanga in environmental management cannot be overstated.

We are therefore encouraged by the recent release of Te Awanui Tauranga Harbour iwi management plan, jointly funded by Environment Bay of Plenty, the Western Bay of Plenty District Council, and the Ministry of Fisheries.<sup>490</sup> This is an excellent example of what can be achieved when tangata whenua are properly resourced by central and local government to participate in environmental planning and management. This plan provides clear guidance on the values the harbour has for the iwi and hapū of Tauranga Māori, and their aspirations for its management.

This level of commitment to iwi and hapū management plans has not been consistently carried through in Tauranga Moana. Ken Tremaine, who coordinated the establishment of SmartGrowth for the councils, singled out the lack of iwi and hapū management plans as 'a disappointing aspect of implementation' on which 'limited progress' had been made in the strategy's (then) two and a half year lifetime.<sup>491</sup>

Funding for these plans remains an unresolved issue. Ken Tremaine indicated that the aim was always that tangata whenua actions would be funded from a number of sources. However, both the 2004 and the updated 2007 SmartGrowth strategies list only Environment Bay of Plenty as a funder for iwi management plans.<sup>492</sup> At the time of our hearings in 2006, Environment Bay of Plenty provided \$30,000 annual funding for iwi to develop management plans.<sup>493</sup> According to Paul Dell, this was generally split between

487. Ronald Te Pio Kawe, brief of evidence, 3 July 2006 (doc R65), p 24

488. SmartGrowth, *50-year Strategy and Implementation Plan*, May 2004, p 86

489. Ibid

490. Te Awanui Tauranga Harbour iwi management plan 2008 (Mount Maunganui: Te Rūnanga o Ngāi Te Rangi, 2008)

491. Kenneth John Tremaine, brief of evidence, 29 September 2006 (doc T32), p 15

492. The Draft SmartGrowth Tangata Whenua Actions were appended to document T32, p 15. They were later adopted to become part of the Smart Growth, *50-year Strategy and Implementation Plan*, May 2007. For iwi management plans see, in particular, p 98.

493. Document T3, p 8; transcript 4-5, p 37



three groups annually, each receiving \$10,000.<sup>494</sup> Tremaine indicated that Te Puni Kōkiri funding, which lapsed in 2005, had not been sufficient to fund iwi management plans.<sup>495</sup> While Andrew Ralph said that Tauranga City Council definitely recognised the need for these plans, we heard no details on any intention to provide funds from this council or from the Western Bay of Plenty District Council.<sup>496</sup> We are also concerned that the 2007 SmartGrowth strategy gives no estimated budget for developing iwi management plans, and indicates that the future approach for implementing tangata whenua actions will be to seek Government assistance.<sup>497</sup> It is noted that ‘securing funding will be an ongoing challenge.’<sup>498</sup> This funding must be found if SmartGrowth is to succeed as a partnership between central government, local authorities, and tangata whenua, as intended.

At the time of our hearings, only Ngāi Te Rangi and Ngāti Kāhu have seen their iwi management plans influence operative district plans (Ngāti Pūkenga and Pirirākau have also prepared plans, but subsequent to the district plan).<sup>499</sup> Anthony Fisher played a significant part in preparing the Ngāi Te Rangi plan. He spoke of his iwi’s hopes that it would influence the review of Tauranga District Council’s first district plan in 1997. In their submission to the review, Ngāi Te Rangi pointed out that, while the district plan recorded the general obligation to protect the Māori relationship with their ancestral lands, there was very little information that ‘spelt out how to give practical effect to those obligations.’<sup>500</sup> Anthony Fisher argued that the aspirations and practical suggestions that the iwi plan contained were not incorporated into the district plan, nor did the council subsequently engage more actively with Ngāi Te Rangi over resource management issues.<sup>501</sup> Paul Dell, giving evidence for Environment Bay of Plenty, told us that ‘processes are being put in place to formalise the use of those documents.’<sup>502</sup>

The potential power of iwi and hapū management plans to shape planning in Tauranga around tangata whenua needs is better shown by Ngāti Kāhu’s 1988 evaluation of their cultural heritage landscape. This document had a significant impact on planning in Tauranga. It helped Ngāti Kāhu to redirect the city’s expansion away from their ancestral lands at Wairoa, establish a papakāinga zone around their marae, and gain recognition for land-based sites of significance in the district plan.<sup>503</sup> All sites significant to Ngāti Kāhu were linked by way of an ancestral origin with Ngā Mārama, the original inhabitants of Tauranga Moana. In this way sites were treated as part of ‘a heritage area and landscape where the

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494. Transcript 4.5, p 37

495. Document T32, p 15

496. Document T7, p 11

497. Smart Growth, *50-year Strategy and Implementation Plan*, May 2007, p 98

498. Ibid p 99

499. Document S7, pp 45–46

500. Document R3, pp 25–26

501. Ibid, pp 23–24

502. Document T3, p 12

503. Document T7, pp 5–6

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relationship was ancestral, rather than as individual sites scattered in a landscape'. In the opinion of Desmond Kahotea, this helped avoid 'the process of attrition that occurs with residential development, with [a] single site approach'.<sup>504</sup> It is notable however that Tauranga City Council only commissioned this evaluation after Ngāti Kāhu successfully appealed proposals to urbanise their ancestral lands.<sup>505</sup>

However, Ngāti Kāhu have lingering concerns about their limited role in managing the Wairoa River where sites of significance still lack formal recognition.<sup>506</sup> As previously noted, Ngāti Kāhu's ancestral relationship with the Wairoa River is long-standing. In lieu of ownership over the river, it is important to Ngāti Kāhu that they at least play a significant part in its management. The midline of the river is the shared boundary of the Western Bay of Plenty District Council and Tauranga City Council. The two councils have produced a non-statutory strategic plan to guide management of the river. This plan recognises that, to Ngāti Kāhu, the 'Wairoa River is a dominant part of [their] ancestral landscape', and seeks to restore their kaitiaki role. It also acknowledges that Ngāti Kāhu believe they need to be involved at a 'governance level' in implementing the strategy. But, in reality, Ngāti Kāhu involvement is essentially limited to the development of a management plan and the documentation of significant sites. They remain only an 'interested party' to be consulted 'at least yearly' by the councils, who remain entirely responsible for managing the river.<sup>507</sup> There is a significant gap between the current planning provisions for Ngāti Kāhu involvement and their desire for meaningful joint management arrangements over the river.<sup>508</sup> Antoine Coffin summarised the hapū's fear if the present planning situation persists:

We foresee a future of conflict between our aspirations to protect our special relationship with the river and environs and the activities of others . . . [causing] degradation of the environmental and cultural quality of the river. We foresee a future as the agitated outsider.<sup>509</sup>

Perhaps more than any other hapū in Tauranga Moana, Ngāti Kāhu have actively engaged with local authority processes, and succeeded in shaping the planning that will largely determine the fate of their ancestral landscapes; yet if even they foresee a future as 'agitated outsider[s]', then the likelihood that the other hapū of Tauranga Moana will be able to exercise their rightful role as kaitiaki of their ancestral taonga must be doubtful. This remains a matter of great concern to us.

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504. Document T18, p 13

505. Document S7, pp 49–50

506. Document R23(a), pp 6–7

507. Wairoa River Valley strategy, pp 13, 33, 39

508. Document R23(a), p 8

509. Ibid

**(3) Resource consent challenges**

As these comments suggest, Tauranga Māori have already spent considerable time and energy attempting to prevent ill-considered development of their ancestral landscapes. Primarily this has been by opposing resource consent decisions.<sup>510</sup> Hinenui Cooper, Ngā Pōtiki kaitiaki kaiwhakahaere, described the work of her hapū's resource management unit:

The main work of the RMU [resource management unit] is to respond to the never ending stream of resource consent applications . . . [we get] between 200 and 230 consent applications each year . . . In addition to making determinations on each of the resource consents that come through, we also have to find the time and resources to make submissions to the constant barrage of district, regional and national policy changes and plans and subsequent hearings, if any . . .

The consent applications we receive vary from creating one new lot for residential housing through to creating full scale subdivision, large commercial and industrial developments and Wastewater Consents. In the past seven years we have made determinations on everything that has been built in and around our 'Rohe' outside the scope of a 'permitted activity', which we are not informed about . . .

Depending on the size and nature of the application, it might be possible to make a determination on an application after just one meeting, but a consent application with far reaching effects could go on for many years.<sup>511</sup>

Mrs Cooper stated that the resource management unit opposed all applications for resource consent, on the basis that each had the potential to detrimentally affect the Ngā Pōtiki environment. Of 'at least 600' consents they had opposed, she could think of only two that were subsequently declined because of the hapū's objections. Disheartened by its lack of influence, she told us, the unit no longer provides detailed submissions, and it declines invitations to speak to its submissions as it regards that activity as 'a waste of our time, effort, and energy'.<sup>512</sup> Similarly, Frank Harawira, of Ngāti Hangarau, described being 'inundated' with resource consents, plan, and policy issues and said his hapū 'just can't deal with every issue'.<sup>513</sup> Maru Tapsell, too, told the Tribunal that:

to be involved in local government processes we need to be attending council meetings, consulting with developers over resource consent applications, opposing inappropriate development, monitoring development sites and so on. It is really difficult for people who work to spare the time for these things so it falls on two or three of us who do not have paid

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510. Document s7, pp 66–67

511. Document R28, pp 5–7

512. Ibid, pp 9–10

513. Frank Te Werahiko Harawira, brief of evidence, 5 July 2006 (doc R66), p 6

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employment to do the running. The time involved can be up to 70 to 80 hours a week and is essentially a labour of love.<sup>514</sup>

At the time he gave evidence, Mr Tapsell was on the Western Bay of Plenty District Council's Māori Forum representing Ngāti Whakaue and on Tauranga City Council's Tangata Whenua Collective representing Waitaha. He was also a member of the SmartGrowth Implementation Committee and involved in SmartGrowth projects including wastewater, water, regional parks, stormwater, the sewerage pipeline, Harbourlink, and the Pāpāmoa East Development Parts 1 and 2.

Tauranga Māori have made 32 appeals over resource management issues to the Planning Tribunal and Environment Court. Almost all have been filed in opposition to the granting of resource consents, rather than to plans.<sup>515</sup> Eddie Bluegum, reflecting on his experience of working on a resource consent challenge that went to the High Court, told us that:

the actual Resource Management processes in practice mean a regional council decision-maker under the RMA is virtually beyond Maori challenge . . . Actual costs, and weak litigation ability, in my submission limit Maori ability to apply for recognition of [RMA sections 6, 7 and 8], especially when the opposition is well funded. I am aware that the cost of litigation may be covered by legal aid; however the costs which fall in civil hearings are subject to repayment by the recipient party; with the burden often falling on one tribal member. I feel this will be an unfair burden on Maori and could restrict Maori participation in the process, and ultimately could result in further land alienation.<sup>516</sup>

Costs involved in challenging planning decisions include legal representation, and often archaeological or scientific reports. Unable to raise the necessary funds, some hapū have taken cases without legal assistance, or have filed appeals that are late or unsupported by evidence. Unsurprisingly, the results have generally been unsatisfactory from the point of view of Tauranga Māori.<sup>517</sup> Te Awanuiarangi Black's diagnosis is that:

Many of our people here in Tauranga are 'punch drunk' . . . from the sheer number of times that we get knocked down when we engage in official processes concerning resource management issues . . .<sup>518</sup>

Several claimants with considerable experience in the resource management field stressed the need for iwi resource management units to be provided with access to funding and expertise.<sup>519</sup>

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514. Maru Tapsell, evidence, 27 September 2006 (doc s33), p 7

515. Document s7, pp 47, 67

516. Document R8, p 10

517. Document U31, p 45; doc U5(a), p 28; doc s7, p 49

518. Document R45, p 16

519. Document s7, p 67; doc R65, pp 23–24; doc R45, p 17

**7.6.3 Some encouraging signs: Ngā Pāpaka o Rangataua**

Before making our conclusions on the current regime, we think it useful to record evidence presented to us which revealed a few more encouraging signs of some hapū building the capacity to act as kaitiaki and express their rangatiratanga. We see this as an initiative worthy of being widely emulated, and one which ought to be fostered by the Crown, and by councils seeking not only ways to fulfil their Treaty and statutory obligations, but also much needed help in their task of caring for the environment of Tauranga Moana.

The group Ngā Pāpaka o Rangataua comprises a number of hapū, including Ngāti Hē, Ngā Pōtiki, Ngāti Pūkenga, Ngāi Tūkairangi, Ngāti Ruahine, and Ngāi Te Ahi, who got together in 1999 after a hui at Maungatapu Marae, called to deal with the issues that had arisen out of the local councils' approach to consultation with tangata whenua under the Resource Management Act.<sup>520</sup> According to Desmond Heke Kaiawha, of Ngāti Hē, the group 'is a current model where Hapu exercise our Rangatiratanga to address holistic environmental issues.'<sup>521</sup> The group's vision is to restore Te Tāhuna o Rangataua, using the kaupapa of kaitiakitanga. It has formed a partnership with NIWA and the New Zealand Landcare Trust to gain data on water quality, aquatic life, land use, and the state of riparian margins in and around Rangataua and the rivers and streams issuing into it. Tangata whenua thereby gain training in collating and analysing data, and a sophisticated scientific understanding of the environment and what impacts on it.<sup>522</sup> Thomas Cooper has been appointed kaitiaki of the Waitao, the largest river entering Rangataua, and whānau from the various hapū are working with the wider community to restore the river. Among the group's successes is to use their data to force improvement of consent conditions regarding the release of storm-water from the Kaitimako quarry.<sup>523</sup> They propose expanding monitoring further throughout Tauranga Moana.

Desmond Heke Kaiawha suggested to us that this was an example of an approach that allowed Māori to exercise collective rangatiratanga over their lands, while still allowing individual land owners to maintain their use rights.<sup>524</sup> In particular, he argued, if such a group could gain legal standing, it might be mandated to negotiate with local government on matters affecting the environment. We see this as a valuable suggestion. Indeed, we note that according to Hinenui Cooper, of Ngā Pōtiki, their ultimate intent is to gain, under the Resource Management Act section 33, a transfer of regulatory powers.<sup>525</sup>

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<sup>520</sup>. Document R34, para 8

<sup>521</sup>. Ibid, para 7

<sup>522</sup>. Document R28, pp 15–16

<sup>523</sup>. Ibid, pp 17–18

<sup>524</sup>. Document R34(a), p 4

<sup>525</sup>. Ibid, pp 7–8

**7.6.4 Conclusions**

Even though the Resource Management Act is universally acknowledged as a significant improvement on previous laws, the claimants' evidence point to several areas of ongoing concern. For several reasons, the Act's provisions that enable Māori to exercise rangatiratanga and act as kaitiaki in environmental management have not yet been properly realised in practice. Councils have been slow to come to terms with the Act's requirements to engage with Māori in their planning processes. At present, the most potentially potent provisions in the Act for the exercise of Māori rangatiratanga are those relating to the transfer, delegation, or sharing of powers; however, councils in the region have made only very small and tentative steps towards sharing powers. Iwi management plans can also now be a powerful tool, but neither central nor local government has properly resourced such plans, and (at least initially), they had very little statutory weight.

Instead of being involved in decision making and engaging in the preparation of plans, Tauranga Māori have expended considerable effort on fighting resource consents. This is a costly and ineffective way to try and shape planning processes, and as a result many Tauranga Māori have become extremely frustrated. The capacity of Tauranga Māori to participate in environmental management as kaitiaki is badly compromised by a lack of resources. Further, their largely unsuccessful battles show that the values of Tauranga Māori, particularly those of a spiritual nature, are not well understood by the general public or local authorities, and are often given little weight in their planning processes.

There is tremendous and largely untapped potential for Tauranga Māori to play a much greater role as kaitiaki over the environments of Tauranga Moana, and to help restore their ancestral landscapes and the taonga of their waterways. Realising their desire to be kaitiaki will require much more constructive working relationships to be forged between tangata whenua, councils, and the wider community. There is considerable scope for such relationships under current legislation; what is required is a greater willingness to realise the enormous potential benefits from Māori involvement.

**7.7 THE SUBMISSIONS OF THE PARTIES**

This section summarises the arguments made in legal submissions by the claimants and the Crown. We also summarise the arguments of the combined submission of the three affected local bodies.



**7.7.1 Claimant submissions**

Generic opening submissions were made on land-based environmental issues and customary fishing, and on environmental issues relating to water and cultural heritage. In closing, the claimants made additional generic submissions on matters relating to rivers, harbours, and the foreshore and seabed.<sup>526</sup> Counsel for Ngāi Te Rangi presented generic closing submissions on environmental issues, and argued that ‘environmental planning and management is probably the most important of the stage 2 issues and the other issues flow from this.’<sup>527</sup> Counsel emphasised that all but two claims pleaded environmental issues as part of their claim, and argued that for many claimants these were their ‘most significant and current grievances.’<sup>528</sup>

Taken overall, the closing submissions of claimant counsel were that:

- ▶ The raupatu by the Crown left Tauranga Māori vulnerable and needing protection for their rangatiratanga.<sup>529</sup> The Privy Council has found that in these circumstances, the Crown has an increased responsibility.<sup>530</sup> The Crown’s fiduciary duty to recognise and protect the rangatiratanga of Tauranga Māori over their natural environment and its resources was therefore heightened in the wake of the raupatu.
- ▶ In judging the Crown’s conduct, the Tribunal is not being asked to apply present-day perspectives to another historical period. It is rather asked to ‘review the Crown’s conduct based on the Treaty exchange recorded in 1840.’<sup>531</sup> The standard against which the Crown’s conduct must be considered is the common intention of the Treaty, namely to provide for two peoples living in this country with mutual respect and to mutual advantage, which required a balancing of interests and compromise on both sides.<sup>532</sup>
- ▶ The Crown has breached the Treaty principles of reciprocity and active protection, by failing to make any provision or protection for Tauranga Māori to exercise rangatiratanga and kaitiakitanga over their lands, waters, resources, and taonga.<sup>533</sup> Instead the Crown has ‘assumed control of all resources and failed to provide Maori with any adequate role in relation to those resources.’<sup>534</sup> Particular failures include not acknowledging the kaitiaki role that Tauranga Māori might play in management of reserves,

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526. Claimant counsel, opening submissions: environmental issues relating to water and cultural heritage, 4 July 2006 (doc R61); doc R64; doc U18

527. Document U31, p 22

528. Ibid

529. Ibid, pp 9–10

530. Ibid, p 10

531. Ibid, p 18

532. Ibid, pp 7–8, 18

533. Counsel for Wai 362 claimants, closing submissions, 24 November 2006 (doc U1), p 122; doc U31, pp 11–13, 36–37; doc U34, p 55; doc U37, p 2

534. Document U31, pp 36–37

iconic landmarks and significant waterways, and making no provision for the spiritual connections between Tauranga Māori and the environment.<sup>535</sup>

- ▶ The active protection of rangatiratanga involved protecting hapū communities, and the ancestral landscapes, taonga, and resources important to them. This included making provision for their cultural values and heritage, and their spiritual relationship with the environment and its resources.<sup>536</sup> Particular taonga singled out in closing submissions included Tauranga Moana (the harbour), the Wairoa River, and the rivers and forests of the Kaimai Range.<sup>537</sup>
- ▶ Exercising rangatiratanga required participation in environmental management and regulation, through political representation on local bodies and standing committees. It also required engagement in planning processes, including consultation.<sup>538</sup>
- ▶ The Crown was obliged to ensure Māori had sufficient resources to participate in these processes; iwi and hapū structures had to be recognised, adequately funded, and given access to expertise.<sup>539</sup>
- ▶ Rather than actively protecting and providing for the exercise of rangatiratanga and kaitiakitanga of Tauranga Māori, the Crown has instead delegated its powers to local authorities, while failing to ensure that those authorities must have regard for the Treaty interests of Tauranga Māori.<sup>540</sup> This is a breach of the Treaty duty of active protection; the Crown cannot avoid its Treaty duty of active protection by delegating powers; where it chooses to delegate power, it must ensure its Treaty obligations, as well as its authority, are passed on.<sup>541</sup>
- ▶ The key period for assessing the Crown's culpability is the period from 1890 to 1991, in particular the decades following the Second World War when the Crown actively supported the development of Tauranga without regard to, and at the expense of, Tauranga Māori.<sup>542</sup> At this time most of the large-scale infrastructure was established in Tauranga, causing substantial degradation and pollution of the environment, and effectively providing 'the framework and the template for development'.<sup>543</sup>
- ▶ Legislation during this period made no reference to the Treaty. Only scant reference was made to Māori interests generally.<sup>544</sup> There was no recognition of Māori spiritual interests in the environment. Legislation singled out for criticism in claimant sub-

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535. Document U31, pp 37, 60; doc U37, pp 29–30; doc U11, pp 77–78

536. Document U31, p 28

537. Document U11, pp 80–82; doc U12, pp 63–64; doc U31, p 58; doc U37, p 26

538. Document U31, p 28

539. Ibid, p 29

540. Ibid, p 37

541. Counsel for Wai 454 and Wai 812 claimants, closing submissions, 11 December 2006 (doc U36), pp 7–8; doc U31, p 27

542. Document U31, pp 36, 38

543. Ibid, pp 38–39

544. Ibid, p 39

missions included planning legislation (up to and including the Town and Country Planning Act 1977), the Water and Soil Conservation Act 1967, and the Reserves Act 1977.

- ▶ The introduction of the Resource Management Act 1991 marks a belated improvement in the Crown legislative and policy regime, but there is still inadequate recognition and protection for Māori interests to provide for Māori tino rangatiratanga. The Act requires only that those exercising powers under the act ‘take into account’ the principles of the Treaty. This weakly worded provision is insufficient to recognise and protect Tauranga Māori Treaty interests.<sup>545</sup>
- ▶ The current management regime under the Resource Management Act 1991 empowers local authorities as decision-makers and excludes tangata whenua.<sup>546</sup> It has positioned tangata whenua as only ‘one of a number of interested parties’, who are consulted, but who have a limited capacity to influence outcomes.<sup>547</sup> The experience of Tauranga Māori has been that decision makers very seldom prioritise Māori Treaty rights or cultural values.<sup>548</sup> At best the Act achieves compromises that still do not fully reflect Māori aspirations or the fulfilment of the Crown’s duty of active protection.<sup>549</sup>
- ▶ Tauranga Māori lack sufficient financial and human resources to participate effectively in planning processes under the Resource Management Act.<sup>550</sup> Instead, for the most part, they have reactively and ineffectively focused on the resource consent process.<sup>551</sup>
- ▶ In overseeing the environmental management of Tauranga Moana the Crown has failed to recognise, respect and protect important natural resources, sites of significance and taonga.<sup>552</sup> Instead, the Crown has, by act or omission, allowed the exploitation, depletion, pollution and despoliation of the claimants’ lands, waters, resources, and taonga.<sup>553</sup> The Crown has not made any appropriate response and remedy for this.<sup>554</sup>
- ▶ The Crown has failed to preserve traditional resources – including kaimoana, flora and fauna – sufficient for Māori to fully maintain their traditional knowledge and cultural values. As a result the mana of tangata whenua has been greatly diminished.<sup>555</sup>
- ▶ The Crown has failed to ensure that Māori retained tino rangatiratanga over their customary fisheries resources.<sup>556</sup> Until 1983, legislation and policy consistently treated

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545. Document U15, pp 26–27; doc U31, p 43

546. Document U5(a), p 27

547. Ibid, p 52; doc U31, p 39

548. Document U5(a), p 26; doc U31, p 43

549. Document U5(a), p 28; doc U15, p 26

550. Document U5(a), p 29

551. Ibid, p 47

552. Document U31, p 37

553. Ibid, pp 37, 40–41

554. Ibid, p 37

555. Ibid, pp 37, 39–40

556. Document U37, pp 25, 27; doc U31, pp 51–56

Māori as simply part of the general public, with no Treaty rights. During this period the Crown permitted or caused the depletion of fish stocks through pollution and insufficient management. Since 1983, some recognition has been made of Māori Treaty interests, but provisions for Māori management of customary fisheries remain narrowly focused, difficult to establish, and underfunded.<sup>557</sup>

#### 7.7.2 Crown submissions

Crown counsel submitted that:

- ▶ In accordance with article 1 of the Treaty, the Crown has assumed responsibility for the governance of resource management in the public interest – including lands, waters, and harbours – for the benefit of all.<sup>558</sup>
- ▶ The Crown accepts that, in exercising its powers, it must actively protect the Māori interests protected by the Treaty. Such protection is not absolute, however; it requires the Crown to do what is reasonable in the circumstances.<sup>559</sup>
- ▶ In carrying out its responsibilities, the Crown has a duty to ensure that its decisions are properly informed about matters important to Māori.<sup>560</sup> However, this duty is not determinative: the Treaty requires a balancing of interests.<sup>561</sup> That balancing requires active protection of resources important to Māori, alongside the need to allow some development and environmental modification.<sup>562</sup>
- ▶ The Crown's exercise of its governance responsibility in the past cannot be judged by the standards of the twenty-first century.<sup>563</sup> Its actions must be assessed in terms of the time, the state of scientific knowledge, and the available options.<sup>564</sup>
- ▶ Ideas of what is appropriate have changed over time. During much of the twentieth century, the focus of central and local government was on developing infrastructure and protecting farmland.<sup>565</sup>
- ▶ Earlier in the twentieth century Māori could influence decision-making through provisions that applied to the public in general.<sup>566</sup> Such provisions did recognise Māori cultural associations: the Tauranga City district scheme of 1969 zoned two marae and two urupā as 'other community uses' under this legislation.<sup>567</sup>

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557. Document U31, pp 51–56

558. Document U29, p 4

559. Crown counsel, closing submissions: introduction and issues 1–2, 8 December 2006 (doc U26), p 5

560. Document U29, p 4

561. Ibid, pp 4,13

562. Ibid, p 4

563. Ibid, p 26

564. Ibid, p 28

565. Ibid, pp 4–5

566. Ibid, pp 5–7

567. Ibid, p 7

- ▶ There has subsequently been ‘an incremental recognition of the need to provide for Māori values in planning’ and to provide mechanisms through which Māori can have input into decision making.<sup>568</sup>
- ▶ The Town and Country Planning Act 1977 provided a number of mechanisms specifically addressing matters of importance to Māori.<sup>569</sup>
- ▶ Though the Water and Soil Conservation Act 1967 made no specific provision for Māori interests, the High Court ruled in 1987 that Māori spiritual and cultural values were included in the ‘interests of the public generally’.<sup>570</sup> The decisions taken by authorities in Tauranga reveal increasing recognition over time of Māori interests in estuaries and the harbour.<sup>571</sup>
- ▶ The principal legislative regime for environmental management is the Resource Management Act 1991. The Crown regards sections 6 to 8 of the Resource Management Act 1991 as ‘consistent with Treaty principles’. Combined, they give significant protection to Māori interests.<sup>572</sup>
- ▶ The Treaty requires a balancing of interests. Sections 6 to 7 indicate the range of interests which must be balanced in the context of the Resource Management Act. In practice, many of these interests are likely to be compatible and complementary.<sup>573</sup>
- ▶ The Crown has taken into account the views of other panels of the Waitangi Tribunal about Treaty of Waitangi consistency. Despite those views, the Crown is not persuaded that amendment of Part 2 of the Resource Management Act is warranted.<sup>574</sup>
- ▶ The Resource Management Amendment Act 2005 now provides for joint management between public authorities and Māori authorities over natural or physical resources.<sup>575</sup>
- ▶ The Local Government Act 2002 supports recognition of Māori interests under the Resource Management Act. This Act sets out principles and requirements that authorities must follow ‘in order to recognise and respect the Crown’s responsibility to take appropriate account of the principles of the Treaty of Waitangi’.<sup>576</sup> Among other things, authorities must provide opportunities for Māori to contribute to decision-making processes, and consider ways to foster Māori capacity to contribute to these processes.<sup>577</sup>
- ▶ The evidence demonstrates that good frameworks have now been established between councils and tangata whenua that enable tangata whenua to contribute to

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568. Ibid, p 5

569. Ibid, pp 9–10

570. Ibid, p 10

571. Ibid, pp 10–12

572. Ibid, pp 12–13

573. Ibid, p 13

574. Ibid, p 14

575. Ibid

576. Ibid, p 17

577. Ibid, pp 17–18

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decision-making processes.<sup>578</sup> This is demonstrated in the range of participation and representation structures developed by councils, and in examples of good engagement, such as extensive consultation over sewage treatment, environmental restoration projects, and SmartGrowth.<sup>579</sup>

- ▶ The growth of Tauranga Moana has had significant effects on Māori, such as loss of shellfish, pollution of waterways, and the loss of important cultural landmarks, such as pā sites and taonga.<sup>580</sup>
- ▶ However, some activities such as logging, swamp drainage, and farming, which have increased siltation in the harbour, began early and were the actions of private individuals. The evidence does not establish the Crown would have foreseen such impacts or considered a need to control such developments.<sup>581</sup>
- ▶ While the economic development of Tauranga generated by farming and the port has had ‘some negative effects on the environment’, it has also ‘provided considerable benefits’, which ‘have flowed to the local tangata whenua.’<sup>582</sup>
- ▶ There may have been no realistic alternatives to some activities, such as locating the railway on reclaimed land.<sup>583</sup>
- ▶ Awareness of the need to control pollution has grown with awareness of the damage it causes. Environment Bay of Plenty has improved current practice with effective results: water quality of estuaries in Tauranga Harbour is now good and improving, as is the quality of shellfish with respect to bacterial contamination; sediment contaminants are generally low also.<sup>584</sup>
- ▶ The statement of issues focused on management, not ownership. Submissions regarding the ownership of riverbeds, fresh water, and foreshore and seabed were filed too late for the Crown to respond appropriately. The presiding officer of this inquiry has directed that environmental issues must not become a general meander through nationally applicable environmental regulation.<sup>585</sup>
- ▶ In some instances the ownership of riverbeds, fresh water, and foreshore raises legal issues which it is not the Tribunal’s role to determine. Further, evidence presented in this inquiry is not sufficient to support or disprove contentions that claimants held unextinguished customary or aboriginal title to the Tauranga foreshore and seabed,

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578. Document U29, p 19

579. Ibid, pp 20–24

580. Ibid, p 25

581. Ibid

582. Ibid, p 26

583. Ibid

584. Ibid, p 27

585. Ibid, pp 28–29



or rights to fresh water. It is inappropriate to make any findings on these issues in the context of the targeted stage 2 Tauranga Moana inquiry.<sup>586</sup>

- ▶ The Crown has recognised Māori Treaty interests in fisheries through legislation. Reviews of the implementation of customary fishing provisions have led to several initiatives to improve iwi involvement in decisions affecting their fisheries.<sup>587</sup>
- ▶ In sum, there has been ‘an incremental recognition of the need to provide for . . . Māori values in planning legislation’<sup>588</sup> as well as an increasing awareness of environmental concerns.<sup>589</sup> The results are seen in the development of planning legislation from the mid-twentieth century onward, culminating in the modern resource management regime.<sup>590</sup>
- ▶ The Crown considers that its Treaty obligations are now discharged by promoting these measures in Parliament and by local authorities’ subsequent actions under these provisions.

### 7.7.3 Local authority submissions

Counsel made closing submissions on behalf of the three local authorities with jurisdiction in the inquiry area (Environment Bay of Plenty, Tauranga City Council, and Western Bay of Plenty District Council) to the effect that:

- ▶ Local authorities are not agents of the Crown and are not a Treaty partner. Local authorities are creatures of statute. Counsel argued: ‘The extent to which they are legally obliged and able to recognise the Treaty of Waitangi is enshrined in statute and case law.’<sup>591</sup>
- ▶ Local bodies had no power to act outside the provisions laid down by statute. Any deficiency ‘does not belong to those who implement [the law], but to those who write it.’<sup>592</sup>
- ▶ Local authorities have complied with their legal obligations to Māori under the respective legislation that governs them, as can be determined by examining the provisions of the legislation and case law.<sup>593</sup>
- ▶ Ngāi Te Rangi are correct that the 20 to 30 years after the Second World War were particularly significant in terms of expansion of the city and impacts suffered by hapū. However, legislation at this time (for example the Town and Country Planning

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586. Ibid, pp 29–30

587. Ibid, pp 45–47

588. Ibid, pp 4–5

589. Ibid, pp 4–5, 27

590. Ibid, pp 6–19, 26–27, 31–36

591. Counsel for local authorities, closing submissions, 12 December 2006 (doc U39), p 2

592. Ibid, pp 5–6

593. Ibid, p 2

Act 1953) made no reference to Māori or their interests, and this is why no specific provision was made for them by local authorities.<sup>594</sup>

- The Town and Country Planning Act provided for the relationship of Māori with their ancestral land to be considered as a matter of national importance. However, this was constrained by an explicit legal ruling to relate this provision only to land owned by Māori.<sup>595</sup>
- Local government legislation prior to the Local Government Act 2002 contained no express reference to the Treaty or its principles, nor any statutory direction to take account of those principles.<sup>596</sup>
- Authorities today play an important role in the recognition of Treaty interests under the Resource Management Act 1991 and the Local Government Act 2002. They are thereby bound to give effect to the Treaty ‘in so far as the relevant governing legislation provides.’<sup>597</sup>
- The overriding purpose of the Resource Management Act, set out in section 5, is to promote the sustainable management of natural and physical resources by avoiding, remedying, or mitigating any adverse effects of human activity on the environment.<sup>598</sup> The courts have ruled that sections 6 to 8, which refer decision-makers to Māori concerns, only qualify or inform the overriding section 5 purpose.<sup>599</sup>
- The courts have explicitly ruled that section 8 does not amount to an obligation to give effect to the principles of the Treaty. Under this statute, local authority obligations are not equivalent to the obligations of the Crown under the Treaty.<sup>600</sup> The direction given by section 8 is ‘a far cry from the Crown’s constitutional Treaty obligations as expounded by the claimants.’<sup>601</sup> The ‘bottom line’ is, however, that if a proposal meets the purpose of the Act, it must be approved – notwithstanding that the decision may be contrary to Māori beliefs, or rights, or both, guaranteed under the Treaty.<sup>602</sup>
- Despite these caveats about the Resource Management Act, Māori ‘have usually been able to invoke all three provisions cumulatively to seek to protect matters of cultural and spiritual value.’<sup>603</sup>

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594. Document U39, pp 7–8

595. Ibid, pp 9–10

596. Ibid, pp 34–35

597. Ibid, pp 3–4

598. Ibid, p 15

599. Ibid, pp 15–17

600. Ibid, pp 18, 20–21

601. Ibid, p 5

602. Ibid, pp 18–19

603. Ibid, p 17

- ▶ Although ‘actions by predecessor organisations would not be acceptable in today’s environment’, local authorities had been on a ‘steep learning curve’ since the introduction of the Resource Management Act.<sup>604</sup>
- ▶ Opportunities for regular Māori participation and input at governance and policy-making level have now improved. This is reflected in the promotion of special legislation by the Bay of Plenty Regional Council, resulting in the establishment of Māori wards for the council, and the involvement of Tauranga Māori in developing the SmartGrowth strategy at both governance and management levels.<sup>605</sup> Local councils have worked very hard at building relationships with Tauranga Māori.<sup>606</sup>
- ▶ Consultation regarding resource consents is not required, but is ‘recognised good practice’. The courts have consistently held that consultation is a two-way process, and that parties who choose to withdraw cannot ‘be later heard to complain that the principles of the Treaty have been infringed’.<sup>607</sup>
- ▶ A ‘lack of resourcing was a constant cry from the claimants with respect to all aspects of resource management processes’, but there was no easy answer to the problem. Local authorities were looking for ways to address the issue but ‘the Crown should bear at least some of the burden for the cost of implementing the legislation’.<sup>608</sup>

#### 7.7.4 Claimants’ replies

A number of counsel made submissions in reply to the Crown and local authorities. These submissions made the following key points:

- ▶ The Crown proceeds from the premise that it has responsibility for the governance of natural resource management, and to perform this role must balance Treaty interests against those of the wider public. This is a flawed analysis of the Treaty. Counsel for Waitaha cited the finding of the Tribunal in the *Whanganui River Report* that Māori rangatiratanga was not to be qualified by a balancing of interests, rather that sovereignty was qualified by the promise to protect rangatiratanga.<sup>609</sup>
- ▶ The Crown defence of the Resource Management Act perpetuates this flawed analysis in arguing that this Act, like the Treaty, requires a balancing of Māori and public interests.<sup>610</sup> On the contrary, it is inconsistent with the Treaty for the Crown to balance the Treaty right of Māori to rangatiratanga over their resources and taonga.<sup>611</sup> As

604. Ibid, pp 30, 39

605. Ibid, p 31

606. Ibid, p 38

607. *Rural Management Ltd v Banks Peninsula District Council* (Unreported, Planning Tribunal, w35/94) (doc u39, p 28)

608. Document u39, p 32

609. Waitangi Tribunal, *The Whanganui River Report*, p 320 (Paper 2.656, p 7)

610. Paper 2.656, pp 7–8

611. Paper 2.655, p 3; paper 2.656, pp 7–8

the Tribunal has previously found, ‘The balancing act is a statutory requirement [that] should be attributed not to the Treaty but to its source – the statute.’<sup>612</sup>

- The Crown does not explain why it is not persuaded by the Tribunal’s findings that the Resource Management Act requires amendment.<sup>613</sup> It is incumbent on the Crown, acting reasonably and in good faith, to pay regard to the Tribunal’s findings.<sup>614</sup>
- The ruling of the Privy Council in the *Broadcasting Assets* case does not mean Crown actions should be judged against prevailing circumstances such as prevailing world-views.<sup>615</sup> This would excuse adopting ‘blatantly racist’ attitudes as a reflection of the generational thinking of the time.<sup>616</sup> The Privy Council affirmed that the Treaty obligations imposed upon the Crown were constant.<sup>617</sup> Therefore, as counsel for Waitaha put it, ‘[t]hat the Crown only became aware during the 1970s of the need to provide specifically for Maori values in legislation is not a defence.’<sup>618</sup>

## 7.8 TRIBUNAL DISCUSSION, ANALYSIS, AND FINDINGS

In this section, we return to the four questions we posed at the beginning of the chapter. We discuss them in light of the Treaty principles identified in chapter 1, and the evidence and submissions that have now been laid out.

### 7.8.1 What rights did the Treaty protect over the natural resources and taonga of Tauranga Moana?

#### (1) Discussion of the facts

As outlined in chapter 1, the essential compact and overarching principle enshrined in the Treaty was the exchange of kawanatanga (the right of the Crown to govern) for the guarantee to Māori of full and exclusive possession (or tino rangatiratanga) over their property and taonga.<sup>619</sup> Article 1 of the Treaty gives the Crown responsibility for making national laws, including laws for the governance of resource management in the public interest, for

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612. Waitangi Tribunal, *The Whanganui River Report*, pp 320–321

613. Paper 2.655, p 3; paper 2.656, pp 8–9

614. Paper 2.656, p 9

615. Paper 2.651, p 3; paper 2.660, pp 2–3; paper 2.656, pp 9–10

616. Paper 2.660, p 3

617. *New Zealand Maori Council v Attorney General* (the *Broadcasting Assets* case) [1994] 1 NZLR 513 at 517; paper 2.660, pp 2–3; paper 2.651, p 3

618. Paper 2.656, p 9

619. Waitangi Tribunal, *Te Raupatu o Tauranga Moana*, p 22

the benefit of all.<sup>620</sup> In return, article 2 guaranteed to Māori tino rangatiratanga over their whenua (lands), kāinga (estates), and taonga.

As the Tribunal and the courts have repeatedly stressed, neither the Crown's right to govern, nor the guarantee of tino rangatiratanga, is absolute under the Treaty; rather the rights of each Treaty partner necessarily qualify those of the other.<sup>621</sup> On this basis there was to be room for two peoples in Aotearoa New Zealand, sharing its natural resources. This relationship, as the courts have emphasised, requires each Treaty party to act reasonably, in good faith, and in the spirit of partnership.<sup>622</sup> Each party is obliged to negotiate with respect, and be willing to compromise.

Claimant and Crown submissions, however, place contrasting interpretations on their relationship as established by articles 1 and 2. The Crown submits that it has the power, in accordance with article 1, to make laws and decisions for the benefit of all. The Crown acknowledges that it is required to provide active protection for Māori interests, and obliged to ensure its decisions are well-informed about matters of importance to Māori. However, the Crown submits that the duty of active protection is not absolute, but must be adjusted according to what is reasonable in the prevailing circumstances. Exercising its powers of governance inevitably requires the Crown to balance a range of interests. Indeed, the Crown argues, the Treaty itself requires this.

The claimants, on the other hand, submit that the Crown must exercise kawanatanga, or governance, in accordance with the guarantee that Māori retain their tino rangatiratanga. This guarantee therefore qualifies the authority of the Crown.<sup>623</sup> Counsel for Ngāi Te Rangi cited the findings of the *Report on the Muriwhenua Fishing Claim* regarding the meaning of tino rangatiratanga:

There are three main elements embodied in the guarantee of rangatiratanga. The first is that authority or control is crucial because without it the tribal base is threatened socially, culturally, economically, and spiritually. The second is that the exercise of authority must recognise the spiritual source of taonga (and indeed of the authority itself) and the reason for stewardship as being the maintenance of the tribal base for succeeding generations. Thirdly, the exercise of authority was not only over property, but of persons within the kinship group and their access to tribal resources.<sup>624</sup>

According to the claimants, the Crown must respect and provide for the rangatiratanga – authority and control – of Tauranga Māori hapū over their taonga. As outlined by counsel

620. Waitangi Tribunal, *Report on the Muriwhenua Fishing Claim*, p 232; Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 131; Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1238

621. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1238

622. *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 663–664, 683; Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1238

623. Document v31, p 25

624. Waitangi Tribunal, *Report on the Muriwhenua Fishing Claim*, p 181

for Ngāi Te Rangi, exercising rangatiratanga requires participation in environmental management, through political representation and engagement in planning processes, including consultation.<sup>625</sup> According to the claimants, the taonga of Tauranga Moana include natural resources such as waterways, forests, and fisheries. The mauri of these entities is also a taonga to be protected. Rangatiratanga itself, as a value that permeates Māori society and culture, is likewise a taonga.<sup>626</sup>

## (2) *Treaty analysis and findings*

We begin with a reminder that, although the entirety of their ancestral landscapes – including the lands, the waters, and the resources of those environments – is significant to the tangata whenua of Tauranga Moana, it is nevertheless noticeable that most of the key taonga discussed in this chapter involve water (others involving wāhi tapu are discussed in chapter 8). We are primarily concerned here therefore with the claimants' relationships with the harbour, with the rivers and waterways draining into it from the Kaimai Range, and with natural resources found in these environments, in particular fisheries. The only other taonga discussed in this chapter are the forests of the Kaimai Range.

In this chapter, we have already established that Tauranga Moana – the harbour – was and remains a taonga to all of the hapū of the district. We have also established that some especially significant rivers and waterways, such as the Wairoa River, and the rivers and streams of the Kaimai Range, are taonga to specific hapū. We have established to our satisfaction also that the forests of the Kaimai Ranges are taonga to hapū such as Ngāti Motai and Ngāti Mahana.

Since colonisation, ownership and management of seas and waterways, and of their resources, have generally not been decided by individual transactions, but by the wider operation of the State and its legislation and policies. It is therefore the question of whether Crown legislation and policy has been consistent with the duties that the principles of the Treaty impose that concerns us here. The relevant principles include reciprocity and partnership, from which flow the duty of active protection, as well as the principles of equity and of redress.

In considering how the principles of reciprocity and partnership inherent in the Treaty exchange should be expressed in the management of natural resources and taonga, this Tribunal begins by accepting that article 1 cedes to the Crown the power to legislate in the national interest. All citizens have an interest in sustainable management and development, and only the Crown is in a position to make policy in the national interest. At least in some situations, the Crown must balance the active protection of resources that are important to Māori alongside the need to allow some development and modification, and alongside the requirements of all citizens.

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625. Document U31, p 28

626. Ibid, p 27



We accept also, however, that the Crown's exercise of sovereignty must be qualified by respect for tino rangatiratanga. The Crown must therefore respect and provide for Māori authority and control over their taonga.<sup>627</sup> As the Tribunal found in the *Report on the Muriwhenua Fishing Claim*, the Crown's right to govern:

is not an authority to disregard or diminish the principles in article the second, or the authority of the tribes to exercise a control. Sovereignty is limited by the rights reserved in article the second.<sup>628</sup>

In signing the Treaty, the Crown reaffirmed the accepted common law doctrine that Māori retained exclusive possession of what they regard as theirs, as determined by their own customs and laws.<sup>629</sup> This is an important, and too seldom realised point: that the legal and the Treaty standard for the Crown's behaviour has essentially remained the same throughout the history of Pākehā colonisation. For, as stated by the chief justice in *Attorney General v Ngāti Apa*, 'From the beginning of Crown colony government, it was accepted that the entire country was owned by Maori according to their customs.'<sup>630</sup> In the same vein, *Te Rauapatu o Tauranga Moana: Report on the Tauranga Confiscation Claims*, stated:

the Crown could not in normal circumstances unilaterally infringe the 'full, exclusive and undisturbed possession' or the 'tino rangatiratanga' of Maori over their land (and other possessions or taonga) without their ready assent through their chiefs.<sup>631</sup>

There is nothing 'presentist' in finding that, if the Crown was to avoid breaching the Treaty when contemplating legislation or policy that overrides the guarantees of article 2 over Māori property, it has always been critical that Māori be fully consulted, and that an honourable attempt be made to reach a negotiated agreement. While this may not always be possible, the Crown has always been bound to make every effort to ensure that if Māori relinquished ownership of or authority over their possessions, they did so knowingly, willingly, and explicitly.<sup>632</sup> These are the obligations inherent in the partnership established by the Treaty.

The key duty flowing from the principles of reciprocity and partnership is that of active protection of the guarantees of article 2. As the president of the Court of Appeal stated in the *Lands* case, the Crown's obligation 'extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable.'<sup>633</sup>

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627. Ibid, p 28

628. Waitangi Tribunal, *Muriwhenua Fishing Report*, p 232

629. *R v Symonds* (1847) NZPCC 387, 390; *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at 684

630. *Attorney General v Ngati Apa* [2003] 3 NZLR 643 (CA) at 657

631. Waitangi Tribunal, *Te Rauapatu o Tauranga Moana*, p 19

632. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, pp 131–133

633. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 642

In the *Ngawha Geothermal Resource Report*, the Tribunal examined in some detail the implications for the Crown of its duty of active protection of Māori resource-use. It identified several important elements of the duty, including:

- ▶ that Māori are not unnecessarily inhibited by legislative or administrative constraint from using their resources according to their cultural preferences;
- ▶ that Māori are protected from the actions of others which impinge upon their rangatiratanga by adversely affecting the continued use or enjoyment of their resources whether in spiritual or physical terms;
- ▶ that the degree of protection to be given to Māori resources will depend upon the nature and value of the resource. In the case of a very highly valued rare and irreplaceable taonga of great physical and spiritual importance to Māori, the Crown is under an obligation to ensure its protection (save in very exceptional circumstances), for so long as Māori wish it to be protected; and
- ▶ that the Crown cannot avoid its Treaty duty of active protection by delegation to local authorities or other bodies (whether under legislative provisions or otherwise) of responsibility for the control of natural resources in terms which do not require such authorities or bodies to afford the same degree of protection as is required by the Treaty to be afforded by the Crown. If the Crown chooses to so delegate it must do so in terms which ensure that its Treaty duty of protection is fulfilled.<sup>634</sup>

We agree with these views about the nature and extent of the Crown's duty of active protection over Māori possession of their lands, waters, and other taonga.

We have stressed that the Crown has always acknowledged that it has been bound to uphold the property rights of Tauranga Māori over their lands, waters, and taonga, as determined by their own customs. Any abrogation of this standard by the Crown constitutes a breach of the Treaty.

However, a further issue then arises – one which is critical in the context of these claims. This is the question of whether, if Tauranga Māori have lost legal rights over their taonga by means that are inconsistent with Treaty principles, they may not now retain any Treaty interests in their taonga. This is a very significant issue for the hapū of Tauranga Moana, since so much of their property has been alienated. They have thereby lost the ability to control or care for their taonga, including wāhi tapu (as discussed in chapter 8), and waterways.

The Tribunal's *Petroleum Report* and *He Maunga Rongo* have each found that Māori retain 'a Treaty interest' whenever legal rights are lost by means that are inconsistent with Treaty principles.<sup>635</sup> Further, when a Treaty interest arises:

634. Waitangi Tribunal, *The Ngawha Geothermal Resource Report 1993* (Wellington: Brooker & Friend, 1993), pp 152–154

635. Waitangi Tribunal, *The Petroleum Report* (Wellington: Legislation Direct, 2003), p 65

there will be a right to a remedy and a corresponding obligation on the Crown to negotiate redress for the wrongful loss of the legal right. Most importantly of all, the Treaty interest creates an entitlement to a remedy for that loss additional to any other entitlement to a remedy.<sup>636</sup>

In many instances, Māori taonga are now in private or public ownership. This is often the case with wāhi tapu, and where riparian rights are held to significant waterways. In either case, these legitimate and undisputed legal rights must modify any residual interest Māori may retain in their taonga.<sup>637</sup> Yet, as demonstrated by the Resource Management Act and other legislation designed to ensure that the quality of the environment is maintained, it is widely accepted that there is a significant role for other members of the community to play in managing significant aspects of the environment. That legislation also specifically requires that decision makers must recognise and provide for the Māori connection to their ancestral lands, waters, and wāhi tapu, regardless of tenure.

We stress that Tauranga Māori themselves clearly still feel obligated to act as kaitiaki over their taonga. Stephen Gates, of Ngāti Kāhu and Ngāti Pango, for example, told us that he has been raised to be the acknowledged kaitiaki of the Wairoa River. He told us, too, something of what his lifelong guardianship of the river and its resources on behalf of his hapū involves. He endeavours, for example, to prevent commercial fishermen illegally constructing holding pens for excess catch in the river; he regularly pulls cars out of the river; and he attempts to control water skiing that erodes the river banks.<sup>638</sup> Gates' guardianship is a clear example of what Mason Durie has noted, that 'the burden incumbent on tangata whenua' is the obligation to be kaitiaki. According to Durie:

The act of guardianship, kaitiakitanga, requires clear lines of accountability to whānau, hapū or iwi and is more frequently associated with obligation than authority. Transfer of the ownership of a resource away from tribal ownership does not release tangata whenua from exercising a protective role to the environment, although it does make the task more difficult since others will also have an interest.<sup>639</sup>

Where Tauranga Māori have lost ownership over their property and taonga against their will, and in breach of the principles of the Treaty, they may retain Treaty rights to exercise rangatiratanga and kaitiakitanga over those resources. As with the central North Island Tribunal, we find that they should ideally be able to exercise rangatiratanga, and act

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636. Ibid

637. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1268

638. Document C17, pp 1–2

639. Mason Durie, *Te Mana Te Kāwanatanga: The Politics of Māori Self-Determination* (Auckland: Oxford University Press, 1998), p 23

as kaitiaki, ‘through their own forms of local or regional self-government or through joint-management regimes at a local or regional level.’<sup>640</sup>

As always, in achieving the spirit of the Treaty there will need to be compromise by both Treaty partners. The taonga of Tauranga Māori are also often highly valued by the wider community. In such cases, it is unlikely to be appropriate for exclusive control to be vested in only one partner. In making a place for two peoples, the need is always to ensure, as the *Report on the Mangonui Sewerage Claim* found, that the rights, values, and needs of neither should be subsumed.<sup>641</sup> The most straightforward way to ensure this does not happen is for each partner to have a place on the bodies that make decisions that determine the fate of significant taonga.

In making these findings, we emphasise that we are not recommending a standard which involves the loss or derogation of any of the existing and legitimate rights of property owners, or of the rights of access and enjoyment of the wider public. We are simply recommending that the Crown provide the means by which Māori can, in practice, share in the existing statutory management regimes that govern their taonga.

We find that such an approach naturally flows also from the fact that the principle of redress requires that loss of property interests in taonga be, so far as is possible, restorative. That is, redress should be directed towards making appropriate and sufficient recompense for specific breaches of the Treaty. Hence, in cases where Crown actions or omissions have either caused Tauranga Māori to lose legal rights to taonga such as significant waterways, or have damaged those taonga, by means that are inconsistent with Treaty principles, then the Crown might make the most appropriate redress by working with iwi and hapū to restore those specific taonga to better health, and by providing hapū with roles in the ongoing management of these significant taonga.<sup>642</sup> Further, as previous Tribunals have found, redress must focus on ensuring that the tribal base is maintained, and tribal mana upheld. For example, the central North Island Tribunal found that where Crown Treaty breaches have caused the vulnerability or scarcity of resources, so that environmental controls are necessary, Māori may need to be exempted from such controls, or given some priority when use of the resource is being allocated.<sup>643</sup>

In sum, the Crown is obliged to protect Māori by providing a legislative system that allows for the expression of Māori rangatiratanga over their taonga, and enables them to fulfil their obligations as kaitiaki. As the central North Island Tribunal has previously stated, rangatiratanga ‘extends to matters both tangible and intangible that they value.’<sup>644</sup> Further, where it can be shown that Māori have lost possession of their lands, waters, and taonga

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640. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1269

641. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Mangonui Sewerage Claim* (Wellington: Waitangi Tribunal, 1988), p 4

642. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1248

643. *Ibid*, p 1243

644. *Ibid*, p 1245

against their will, that legislative system cannot be limited to resources legally owned by Māori. The crux of the matter, as the central North Island panel has pointed out, is that the Crown should ‘provide for a system of resource management that allows Maori to exercise their rangatiratanga over their taonga (whether owned or not).’<sup>645</sup>

The Crown’s obligation to provide a system of resource management that provides for rangatiratanga necessarily restricts how and when it may balance its obligations to its Treaty partner against the needs of other parts of the community. The Crown cannot take as a matter of course its right to circumscribe Māori rangatiratanga for reasons of balancing competing interests.<sup>646</sup> The partnership created by the Treaty requires that each party recognise the interests of the other in natural resources, especially those of such undoubted significance to Māori that they must be regarded as their taonga.<sup>647</sup>

The following sections analyse claims that the Crown has failed, or continues to fail, to provide for the exercise of the tino rangatiratanga of Tauranga Māori over specific resources and taonga, and does not enable them to act as kaitiaki. In each case we apply the standards set out in this section, namely: has the Crown protected the ability of Māori to use their taonga according to their own preferences, and protected them against the actions of others which impinge upon their rangatiratanga? In the case of highly valued, rare, and irreplaceable taonga of great physical and spiritual importance to Tauranga Māori, has the Crown ensured their protection, or did exceptional circumstances justify another course of action? If so, did the Crown fully consult, negotiate openly and in good faith, and pay proper compensation, for the loss of authority and control over resources and taonga? And, finally, in delegating its powers, has the Crown ensured that its representatives have been held to an equivalent standard?

### **7.8.2 Has the Crown protected the tino rangatiratanga and kaitiakitanga of Tauranga Māori over their taonga?**

We have found that the Crown ought to protect Māori tino rangatiratanga primarily by guaranteeing Māori possession of their property and taonga as long as they wish to retain them. This is the plain meaning of article 2 of the Treaty. We note that Māori customary tenure is a complex matter, but we reiterate that the closest expression known to English law for the nature and extent of their possessions is ownership.<sup>648</sup> In this inquiry the claimants argued they ought to have retained customary ownership over Tauranga Moana and over freshwater waterways. We assess the Crown’s role in the processes by which Tauranga

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645. Ibid, p1246

646. Waitangi Tribunal, *The Whanganui River Report*, pp 328–329; Waitangi Tribunal, *He Maunga Rongo*, vol 4, pp 1239–1240

647. Waitangi Tribunal, *Mohaka River Report*, p 65

648. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p1258

Māori lost ownership of these two resources in turn, before discussing broader issues of environmental management.

**(1) Loss of ownership over Tauranga Moana**

**(a) Discussion of the facts:** As described earlier in this chapter, the Native Minister, Ballance, admitted to Tauranga Māori that the answer to the question of who rightfully owned and controlled Tauranga Harbour and its fisheries depended upon the ‘construction’ placed on the Treaty, and its relationship to law. Ballance argued that unless the Treaty ‘distinctly withheld’ property rights, they became the property of the Crown, as ‘in all her dominions’.

Of course the Treaty, as Ballance knew, does distinctly withhold to Māori their lands and fisheries. The foreshores (and indeed the seabed) are lands. Further, the claimants assert that Tauranga Moana is a taonga. Previous Tribunals have found that harbours can be taonga, such as Napier Harbour which the *Te Whanganui-a-Orotu Report* said was owned by the claimants as equally as any area of dry land.<sup>649</sup> We have already discussed the importance to Tauranga Māori of their moana. It is clear that the harbour and its foreshores were and remain crucial aspects of their economic, cultural, and spiritual well-being and identity. Tauranga Moana was and is, clearly and indisputably, a taonga of all of the hapū of Tauranga Moana.

But Ballance assumed, as successive governments did long after him, that the common law of England was to be received unmodified in New Zealand. On this basis, the Crown was regarded as the presumptive owner of the foreshore and seabed, while fisheries were open to all. We accept, of course, that the Crown adopted this stance in the belief that Crown ownership of the foreshore was necessary in the public interest, and that all citizens had an equal right to fish. However, this stance is mistaken on two grounds. First, it ignores the proper influence of the common law doctrine of aboriginal title on the law of New Zealand. Second, whatever the content of the common law, it should not have overridden the guarantees given to Māori by the Treaty.

The courts stated authoritatively in the 1840s that the Treaty itself asserted nothing more than the established common law doctrine of aboriginal title.<sup>650</sup> Put simply, the doctrine of aboriginal title ought, as a matter of law, to have protected Māori customary title to all that they possessed. Thus, as Lord Cooke stated in 1994, the guarantee of tino rangatiratanga ‘must have been intended to preserve for them effectively the Maori customary title.’<sup>651</sup>

However, for almost a century the Crown asserted that, in acquiring sovereignty, it acquired ownership and beneficial title over the foreshore and seabed. With respect to the foreshore the courts rejected this assertion in 1963, where it was reiterated that the Crown had to establish ownership by clearly extinguishing Māori customary title. However,

649. Waitangi Tribunal, *Te Whanganui-a-Orotu Report* 1995 (Wellington: Brooker’s Ltd, 1995), pp 201–205

650. *R v Symonds* (1847) NZPCC 387, 390

651. *Te Rūnanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA) at 23–24



the court held that in fact the Crown still ‘owned’ the foreshore as a consequence of a presumption that all customary titles had been converted to Crown grants by the Māori Land Court.<sup>652</sup> In 2003, the Court of Appeal found this presumption was mistaken both in fact and in law. The Crown responded by extinguishing the possibility that Māori might test their rights to customary lands in the foreshore and seabed in court.

Though we cannot say with certainty what the results of testing claims to customary title over the foreshore in Tauranga might have been, we are guided by the findings of the Tribunal’s *Report on the Crown’s Foreshore and Seabed Policy*. That Tribunal concluded that many claimants before it could prove their ancestral connection with the foreshore and sea, to the exclusion of other tribes (unless present by their permission). They could also prove a spiritual and physical relationship with the foreshore and sea, governed by tikanga that regulated their behaviour.<sup>653</sup> It concluded that in such cases, when brought before the Māori Land Court, ‘land in the foreshore and seabed would be declared customary land, and would at least sometimes be vested as freehold land.’<sup>654</sup>

We note that Tauranga Māori retain ownership of ancestral lands with water frontage at numerous places around Tauranga Harbour. However, it is not our role to determine as a matter of law whether these lands include the foreshore or seabed. The more important issue is that the Crown should not have presumed it could introduce legislation simply overriding the guarantees given to Māori by the Treaty. In the *Tē Whanganui-a-Orotu Report*, in respect of the Napier harbour, the Tribunal found that the Treaty is a compact that was established prior to the reception of the common law in New Zealand. It was in fact the bargain by which sovereignty and the right to receive English common law was negotiated. That Tribunal therefore concluded that the Crown cannot:

rely on a principle of English common law to deprive Maori of their taonga . . . [this] would be a breach of the Treaty principle to actively protect the property of Maori . . . common law rights cannot override Treaty rights . . . [because] the exercise of British sovereignty is qualified by the article 2 guarantee of tino rangatiratanga.<sup>655</sup>

Other Tribunal reports, for example *He Maunga Rongo*, have reiterated this point, stressing that it cannot be consistent with the principles of the Treaty to strip Māori of possession of their taonga by ‘tacit application of presumptions of English law of which Maori knew nothing.’<sup>656</sup> On the contrary, the Treaty requires the Crown to legislate so that Māori property rights are protected.<sup>657</sup> English common law may not be capable of recognising such things as ownership over the seabed that constrains public access, or an exclusive right

652. *In re the Ninety-Mile Beach* [1963] NZLR 461, 462; see Boast, *Foreshore and Seabed*, pp 70–71

653. Waitangi Tribunal, *Report on the Crown’s Foreshore and Seabed Policy*, pp 74–75

654. *Ibid*

655. Waitangi Tribunal, *Tē Whanganui-a-Orotu Report*, p 206

656. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1243

657. *Ibid*, pp 1260–1261

## 7.8.2(1)(b)

to fish.<sup>658</sup> Insofar as the common law could not or did not provide for Treaty guarantees, the Crown should have legislated so that the law here did so.<sup>659</sup> Alternatively, if the Crown believed that Crown ownership of the foreshore was necessary in the public interest, then it needed to negotiate any extinguishing of Māori property and Treaty rights openly and in good faith. This it never did, despite the repeated efforts by Tauranga Māori to have the Crown recognise their rangatiratanga over Tauranga Moana and its fisheries.

**(b) Treaty analysis and findings:** Tauranga Māori ought to have had the full protection of their Treaty rights to rangatiratanga and kaitiakitanga over Tauranga Harbour recognised at all times, unless alienated by freely negotiated agreement, or when strictly necessary in the national interest. In consistently refusing to acknowledge Māori rangatiratanga over Tauranga Harbour, we find that the Crown has therefore acted contrary to both the plain meaning of article 2, and the principles of partnership and the duty of active protection.

We find that in usurping ownership over Tauranga Moana and presuming to delegate ownership to other entities, the Crown has committed a number of Treaty breaches. The historical assertion of Crown ownership over the foreshore and seabed of Tauranga Moana has usurped Māori rangatiratanga and kaitiakitanga, in breach of the principle of partnership, and the principle of active protection of lands and taonga, including rangatiratanga. This usurpation has been continued by the Foreshore and Seabed Act 2004. This Act stripped Māori (and only Māori) of the chance to test their property rights under the common law, breaching the plain meaning of articles 2 and 3, in addition to breaching the principles of active protection and equity.<sup>660</sup> As the *Report on the Crown's Foreshore and Seabed Policy* found, replacing potential property rights with the ability 'to participate in management and decision-making processes in relation to the coastal marine areas over which they hold [customary] titles' provides insufficient redress. These new 'customary titles' are clearly not intended to approach ownership, as *might* have been granted by the Māori Land Court.<sup>661</sup>

**(2) Loss of ownership of waterways**

**(a) Discussion of the facts:** Many previous Tribunals have accepted that rivers and waterways may be taonga to particular Māori hapū and iwi.<sup>662</sup> The only explicit claims before us about specific rivers being taonga are those made by the Wairoa hapū, for the Wairoa River, and by Ngāti Motai and Ngāti Mahana, for the rivers of the Kaimai Range.<sup>663</sup> We also heard

658. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, pp 50–56

659. Waitangi Tribunal, *He Maunga Rongo*, vol 4, pp 1260–1261

660. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, pp 127–129

661. Ibid, p 99. As we finalise this report, we note the Government's recently announced intention to repeal the Foreshore and Seabed Act 2004.

662. Waitangi Tribunal, *Manukau Report*, p 70; Waitangi Tribunal, *Mohaka River Report*, pp 10–19; Waitangi Tribunal, *The Pouakani Report* 1993, p 297; Waitangi Tribunal, *Te Ika Whenua Rivers Report*, pp 135–136; Waitangi Tribunal, *The Whanganui River Report*, pp 336–337

663. Document U37, p 26; doc U11, pp 81, 84–85

evidence and submissions from Ngāti Pūkenga about the ‘great cultural significance’ of the Waitao River, and from Ngāi Te Ahi and Ngāti Ruahine regarding the significance of the Waimapu River.<sup>664</sup>

We heard the most extensive evidence regarding the traditional and contemporary significance of the Waitao River. Witnesses from the Waitao River hapū testified using mihi and pēpeha that invoked the river. Their many stories that centred on and around the river referred to traditional histories, related encounters with protective taniwha, stressed the abundance and variety of foods and other resources, and highlighted the need to safeguard the health of the river and its mauri.<sup>665</sup> The evidence we heard about the other rivers claimed as taonga was consistent with this attitude to waterways in the inquiry district. We have no difficulty in accepting that these waterways of Tauranga Moana are taonga of the claimants.

As discussed earlier, the loss of Māori ownership over waterways in Tauranga occurred through a combination of the raupatu and the common law. The raupatu stripped Māori of the ownership of waterways. This was just as much a breach of the Treaty as the confiscation of lands. The stage 1 report, *Te Raupatu o Tauranga Moana*, has already found that the raupatu was a breach of the Treaty, and a denial of due process at law.<sup>666</sup>

When some of the land was returned, it was held under Crown grant, not customary title, and common law rules of ownership were applied. The common law rules, in particular the *ad medium filum aquae* rule, differed from and conflicted with Māori concepts, and we have no evidence that Māori knew about these rules. The rules effectively extinguished rangatiratanga over rivers as single entities managed and possessed under the mantle of hapū authority.<sup>667</sup>

As discussed earlier in this chapter, the Treaty guaranteed that Māori should retain what they possessed. Māori regarded rivers as whole and indivisible entities. They possessed more than merely river beds and banks. As found in *The Whanganui River Report*, ‘[i]ncluded in that possessed was the water’.<sup>668</sup> Therefore, as *He Maunga Rongo* stated:

the waters cannot be divided out and must be considered a component part of that taonga. The issue in relation to water is about the holistic nature of the resources in Maori custom and the relationships of the people with those resources. It is also about possession akin to ownership and the right to control access to the water.<sup>669</sup>

664. Claim 1.48(a) p 29; doc G26, pp 5–8; doc G27, pp 4–5; doc Q5, pp 9–10; Joe Kee, brief of evidence, 26 June 2006 (doc R29), pp 15–16; Amy Sinai McLaughlin, brief of evidence, 25 September 2006 (doc S22), p 1

665. Document E3, p 8; doc E13, pp 5–6; Rehua Smallman, brief of evidence, 22 May 2006 (doc Q18), p 2; Shane Ashby, brief of evidence, 22 May 2006 (doc Q23), p 1; Te Keepa Smallman, brief of evidence, 22 May 2006 (doc Q24), pp 4–5; doc Q25, pp 3–4; doc R42, pp 6–7; doc R43, pp 7–8; doc R45, pp 13–14

666. Waitangi Tribunal, *Te Raupatu o Tauranga Moana*, p 400

667. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 136

668. Waitangi Tribunal, *The Whanganui River Report*, p 262

669. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1252

This is not the place for a detailed examination of the question of what rights to waterways Māori might retain at law. We do note however that the courts have expressed differing opinions as to whether Māori property rights in navigable and non-navigable rivers have been extinguished. Regarding navigable rivers, Lord Cooke in *Te Rūnanganui o Te Ika Whenua Inc Society v Attorney-General* referred to the Māori concept of rivers as indivisible taonga and commented that the Coal-Mines Amendment Act 1903 ‘may not be sufficiently explicit to override or dispose of that concept’. However, in *Ngāti Apa v Attorney-General* Justices Keith and Anderson unequivocally found that this Act extinguished customary title. The basis for the *Ngāti Apa* decision was the application of the phrase ‘absolute property’ to river beds; as Boast points out, this phrase applies to minerals in the beds, not to the beds themselves, which are only ‘vested’ in the Crown.<sup>670</sup> *He Maunga Rongo* concluded, as do we, that ‘if judges of this rank cannot agree, it is still an issue to be finally settled in law’.<sup>671</sup>

Regarding non-navigable waterways, we note that while application of the *ad medium filum aquae* rule is settled law, Lord Cooke has commented that this rule ‘is inconsistent with the concept [of Maori customary title] and may well be unreliable in determining what Maori have agreed to part with’.<sup>672</sup>

The key Treaty issue in regard to the ownership of waterways is that the Crown never attempted to clearly and plainly extinguish Māori possession of waterways, or sought Māori consent to relinquish their property rights. The assertion of ownership to navigable waterways was embedded in an obscure clause of the Coal-Mines Amendment Act 1903. Application of the *ad medium filum aquae* rule in Tauranga occurred in the wake of the raupatu. Where Māori retained rights after the return of land, those were not equivalent to those of customary title. Customary ‘communal’ title was replaced with European individual title. Rangatiratanga over waterways was lost. In all these circumstances, it is clear that Tauranga Māori had not agreed to part with anything, let alone rangatiratanga over their rivers.<sup>673</sup>

**(b) Treaty analysis and findings:** The Crown’s efforts to secure title to navigable rivers through the Coal-Mines Amendment Act 1903 represent a very serious breach of Treaty principles. Instead of providing active protection, the Crown unilaterally removed Māori property rights. It did so without consultation – indeed, by an obscure and virtually undebated clause of a seemingly unrelated Act. This was a breach of the principles that the Crown should seek to engage with Māori in a spirit of partnership, and act in good faith.

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670. Document v18, p 19

671. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1265

672. *Te Rūnanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20, 27 (CA)

673. The *ad medium filum* presumption can be rebutted by surrounding circumstances, if for example the vendor had no intention of parting with the bed to the middle line at the time of sale. *King v Morison* [1950] NZLR 247 at 254; see also Waitangi Tribunal, *Mohaka River Report*, pp 36–37.

Incorporation of this provision in subsequent legislation, most recently as section 354(1) of the Resource Management Act 1991, has allowed the breach to continue.

There were prejudicial effects when statute and common law were subsequently applied. When the Crown and settlers later began to assert riparian rights to the river, hapū found that their rangatiratanga and customary title over their rivers had been lost at law, through processes of which they were wholly unaware.

In asserting ownership over key environments such as foreshores, harbour and inshore seabeds, and navigable waterways, the Crown did not consult with Māori. Nor did it do so when imposing the common law over other waterways. The loss of possession left Tauranga Māori struggling, for a century or more, to assert their rights to participate in the control and management of their taonga.

**(3) *Rangatiratanga in environmental management, 1886–1990***

**(a) *Discussion of the facts:*** Allegations about the loss of their authority and control over the environment and natural resources are central concerns for the claimants. We heard evidence that Tauranga Māori were unable to exercise rangatiratanga and kaitiakitanga over many resources and taonga, particularly waterways and customary fisheries. With regard to waterways, for example, Tauranga Māori argued that they lacked any authority to contest, let alone control, activities such as hydroelectric development and quarrying that have diverted or polluted their taonga.

The Crown agrees that Māori interests were not explicitly provided for in legislation until recently, and that Māori had no input into decisions regarding their taonga other than as ordinary members of the public. However, the Crown argues that ideas of what is appropriate have changed over time and that there has been ‘an incremental recognition of the need to provide for Māori values in planning.’<sup>674</sup>

The Crown argues that judging what was reasonably expected of it at any time requires a range of factors to be taken into account. They include practicalities (such as its options, resources, motives, and capacity to foresee the consequences of actions) and also the thinking of the time – such as views on the legitimate role of the State, and the prevailing world-views of decision-makers and their generation.<sup>675</sup> In sum, the Crown argues its behaviour must be judged according to the practicalities and standards of the time.

We accept that practicalities are always relevant to what it is reasonable to do in any given circumstance. But we must be very cautious in invoking the standards of the time, such as the prevailing world-views of settlers, as a guide. First, and most importantly, we are simply required by law to adhere to the principles of the Treaty as the measure by which we must judge the Crown’s behaviour. Secondly, as the central North Island Tribunal found, there are additional criteria to consider. The Crown has always been honour-bound to keep its

674. Document u29, pp 4–5, 26

675. Document u26, p 6

promises to Māori. These promises must be taken at face value.<sup>676</sup> Moreover, a reasonable Crown was not bound to act only according to the tyranny of a majority of settlers: parliaments in the late-nineteenth century were quite capable of high ideals in both theory and practice.<sup>677</sup> Thirdly, and finally, the world-view of Māori cannot be dismissed as irrelevant to the situation. What Māori regarded as reasonable was also a valid context for Crown decisions, especially in regard to their taonga.<sup>678</sup>

The evidence presented to us suggested that, for Tauranga Māori, ideas of what is appropriate did not change greatly over time. On the contrary, that evidence testifies to their consistent desire to have far greater input into environmental management over their taonga, and to act as kaitiaki to protect their taonga from excessive exploitation and pollution.

We take the issue of rangatiratanga over fisheries as our first example. The Treaty explicitly protected Māori possession of their fisheries. But it is undeniable that, until the modern regime, legislative provisions that recognised any distinctive Māori interest in fishing were very limited. Yet, since the late nineteenth century, Tauranga Māori have consistently asserted to the Crown that they had rights to possess and control the exclusive and undisturbed fisheries explicitly promised them by the Treaty. Until comparatively recently, the Crown (equally consistently) always refused to grant them any exclusive rights to fish. While provisions existed on paper whereby Māori could apply to establish customary reserves from 1900 until 1962, these were never actually created – despite requests from many iwi. Tauranga Māori were among those who petitioned the Crown about fishing and shellfishing in the 1920s, 1940s and 1950s. Official policy was, however, to refuse all such requests from Māori for exclusive control over fisheries.

The Crown did introduce measures to limit trawling and seining from time to time, yet it gave no particular consideration to Māori needs or rights with respect to their customary fishery. Rather, the Crown positioned Māori as one interest group among many.<sup>679</sup> Overall, very little recognition seems to have been given to the fact that many Tauranga Māori historically relied on their customary fisheries for sustenance, rather than recreation. Though Māori do not now depend on kaimoana for survival, gathering it remains a key aspect of their traditional culture, and they are entitled to the Crown's active protection of that culture. It was clear from the evidence that Tauranga Māori have a strong desire to sustain and nurture this aspect of their culture as a taonga tuku iho.

We heard compelling evidence that Tauranga Māori have had increasing difficulty in using and enjoying the traditional resources from Tauranga Moana according to their cultural preferences. We have described how they have struggled, for example, to access adequate supplies of kaimoana, even including the failure to provide once-abundant foods

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676. Waitangi Tribunal, *He Maunga Rongo*, vol 1, pp 180–181

677. Ibid, pp 181–188

678. Ibid, pp 188–189

679. Document D7, pp 104–113



such as titiko for hui. In their own eyes, this has reduced their collective mana. We find that the historical Crown legislation and policy regarding fisheries, as well as that regarding the water quality of Tauranga Moana, has not provided adequate protection for the interests of Tauranga Māori.

In assessing the adequacy of the current fishing regulations we note, first and foremost, the difficulty experienced in establishing taiāpure and mātaimai. As we have observed, the record is: no taiāpure, and one mātaimai, in 20 years. Further, despite better provisions for tangata whenua participation in fisheries management, they believe that fisheries continue to decline. This, we believe, is a case where the Crown's legislative regime can, in theory, provide Tauranga Māori with an acceptable degree of rangatiratanga over their customary fisheries. However, we urge the Crown to continue improving the implementation of its legislation, lest further Treaty breaches occur.

We take the case of rangatiratanga over waterways as our second issue. The Crown assumed from the outset that common law rights of riparian ownership applied in New Zealand. This stance ignored Māori rights to have their possession of waterways affirmed under New Zealand law. It has been argued that possession of natural water itself could not be recognised by the common law. However, powers of management, akin to possession, clearly could be conferred by statute, since the Crown has assumed outright the power to control the management of natural water ever since the passing of the Water and Soil Conservation Act 1967. This Act delegated significant management powers to local authorities, yet no consideration was given to granting powers to Māori.

Tauranga Māori have struggled for any statutory recognition of their values and interests in waterways. Until comparatively recently, the Crown completely ignored their Treaty right to any authority and control over these taonga. The hapū of Tauranga Moana have found it increasingly difficult to access and enjoy the diminished resources of their ancestral rivers, over which they have been unable to properly act as kaitiaki, and which have been polluted, and degraded by the action of others. Their values concerning those rivers, and their rangatiratanga over them, have been impinged upon by others, to the detriment of their mana, and without adequate protection from the Crown.

Our third case study is the Crown's overriding of Māori rangatiratanga in the name of conservation. Kārewa Island is one example of land taken from Tauranga Māori under statutory powers (in this case the Animal Protection Act 1908), because it was believed that Tauranga Māori were incapable of protecting or conserving indigenous species. This paternalism, and disregard for Māori authority, was quite unjustified: Tauranga Māori posed no threat whatsoever to tuatara, the primary species concerned. They had a long history of sustainable exploitation of indigenous species such as the petrels of Kārewa, Tūhua, and other offshore islands. It may have been true that they were struggling to control access to the island, and were unable to prevent the depredations of poachers. However, an inability

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to control theft is hardly a reason for further taking of property, and an overt expunging of rangatiratanga. On the face of it, this situation called for quite a different response, namely assistance and active protection by the State for Tauranga Māori in the defence of their lands and resources.

Occasionally, exceptional circumstances and the national interest have required the Crown, as a matter of last resort, to expropriate or fail to protect Māori authority and control. We accept, for example, that the Crown has been justified in removing customary harvest rights to critically endangered species such as kererū.<sup>680</sup> We note, of course, that when resources are threatened, Māori customary practices also proscribe taking them, and rāhui would be imposed until they recovered. By the claimants' own accounts, kererū are among the many native species which remain gravely threatened in Tauranga.

In less exceptional circumstances, we do not accept the Crown's defence that the standards of the time have excused it from meeting its Treaty obligations. The Crown presented no other substantial defence. It did not point to any substantive example before the mid-1980s where Māori interests and concerns in environmental management were considered other than as members of the general public. Nor did it cite examples of Māori concerns affecting decisions – let alone Māori being able to effect decisions of their own – in relation to environmental management.<sup>681</sup> We therefore do not accept that the Crown can be excused the almost total lack of provision for Māori rangatiratanga in environmental management prior to 1991. The Crown acknowledges 'an incremental recognition of the need to provide for Māori values in planning'.<sup>682</sup> This is an oblique admission that, for a long time, this need was not recognised at all – let alone addressed.

Tauranga Māori have suffered wide-ranging prejudice as a result of their historical lack of authority and control in environmental management. The Crown has compromised the ability of Māori to sustain themselves through their traditional economy by allowing and encouraging competition from other interests in their waterways and fisheries. The Crown usurped control over their fisheries, barred Tauranga Māori from the exclusive control of their marine and freshwater resources, and therefore hampered them from developing those resources. Combined with the loss of their lands, this stripped Tauranga Māori of the economic base from which they could choose to live according to their traditions, or effectively compete in a commercial economy.

**(b) Treaty analysis and findings:** We find that, given its adherence to the Treaty, the Crown was not entitled to rely on the common law or on statute to strip Māori of their rangatiratanga, and to usurp possession of environments such as Tauranga Moana and waterways. We find that the Crown did not historically provide for Māori to have adequate powers of

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680. Waitangi Tribunal, *Rekohu*, pp 270–271

681. Document U29, pp 10–11

682. *Ibid*, pp 4–5

management over their taonga. We accept that, in some exceptional cases, the Crown has been justified in asserting control over resources – for example, over endangered species. But in all other circumstances, we find that the Crown has been in continuous breach of the plain meaning of article 2 of the Treaty, by failing at any stage to make adequate provision for Māori rangatiratanga and kaitiakitanga over their property and taonga. The Crown has thereby breached the Treaty principle of active protection.

### **7.8.3 Has the Crown been responsible for degradation and pollution of the natural resources and taonga of Tauranga Māori?**

#### **(1) Discussion of the facts**

On the basis of the evidence presented to us, we have no doubt that the customary resources of Tauranga Moana have been diminished, and that the taonga of its tangata whenua have been degraded and polluted. However, a question remains over whether, as the claimants generally assert, such outcomes have been the responsibility of the Crown. The Crown has argued that its actions must be judged in the context of their time, the state of scientific knowledge, and the options available. The Crown also notes that land use in Tauranga, focused on farming and the port, has brought benefits to Māori as well as having environmental impacts.<sup>683</sup>

Tribunals in previous inquiries have taken two approaches to the question of Crown responsibility for pollution and other modifications of the environment. The *Te Whanganui a Tara me ona Takiwa* report on the Wellington district and the *Ngai Tahu Report* considered the question of whether direct correlations could be established between Crown actions or inactions and a particular environmental modification.<sup>684</sup> The *Hauraki, Mohaka ki Ahuriri*, and *Te Tau Ihu o te Waka a Maui* reports considered a different and broader question: whether the Crown had recognised and acted on evidence of the need for environmental controls early enough.<sup>685</sup>

The Hauraki Tribunal emphasised that the Crown had breached the Treaty by not paying attention to ‘Maori concerns, expressed consistently in petitions and at parliamentary inquiries over the many instances of damage to their lands and resources.’<sup>686</sup> The *Te Tau Ihu Report* found that the Crown had breached the Treaty by being ‘almost entirely neglectful of Maori interests in their customary resources, although these interests were known to it’.

683. Document U29, pp 25–26

684. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 3, pp 906–911; Waitangi Tribunal, *Te Whanganui a Tara me ona Takiwa: Report on the Wellington District* (Wellington: Legislation Direct, 2003), pp 473–475

685. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, vol 2, p 636; Waitangi Tribunal, *Hauraki Report*, 3 vols (Wellington: Legislation Direct, 2006), vol 3, p 1160; Waitangi Tribunal, *Te Tau Ihu o Te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington, Legislation Direct, 2008), vol 3, pp 1199–1200

686. Waitangi Tribunal, *Hauraki Report*, vol 3, p 1160

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Further, it found that Māori had no share in the decisions regarding the environment. The result was environmental change ‘in a manner that gave no protection to Maori interests in their customary resources.’<sup>687</sup>

On the basis of the evidence presented in our inquiry, we take the latter, broader approach. We agree that the Crown cannot be held solely responsible for the broad sweep of environmental change in Tauranga, as elsewhere in New Zealand.<sup>688</sup> European settlers relatively new to these lands inevitably struggled to perceive the downstream consequences of their actions. There was little sense among New Zealand’s settler society in the late nineteenth or early twentieth century that indigenous environments should be protected in perpetuity.<sup>689</sup> Tauranga Māori have also been farmers; they too have cleared areas of forest and drained wetlands.<sup>690</sup> Their descendents, at least, showed some regret at the necessity for this. Rapata Wepiha, whose family farmed at Whaaro, for example, told us that:

There were swamps all around Whaaro which contained eels, raupo and flax. The women would gather the raupo and flax. Because of the demands put on us by a cash economy, we were forced to bring Whaaro into production. The swamps were impassable, and had to be drained to prepare for dry stock. In doing so our taonga were destroyed.<sup>691</sup>

Clearly, the destructive treatment of the taonga of Tauranga’s indigenous environment in the late nineteenth and early twentieth century, though regrettable in very many respects, is not necessarily always a breach of the Treaty.

Yet, even in the early twentieth century, the Crown had some information about many of the negative cumulative impacts of settlement on the environment. There were, for example, widespread public and official concerns about the possible effects of deforestation on timber supplies, climate, and soil erosion.<sup>692</sup> Forest clearance and swamp drainage were also linked to a decline in populations of fish and, in the early 1930s, the Marine Department was advised that ‘known [inanga] spawning grounds should be fenced off’.<sup>693</sup>

Crown officials were also aware of problems with the pollution of Tauranga Harbour from the early twentieth century, especially the effects of sewage disposal.<sup>694</sup> From 1928 onwards, Tauranga Māori consistently and vocally made known to the Crown their concerns over this issue. Though officials themselves often echoed these concerns, governments of the day

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687. Waitangi Tribunal, *Te Tau Ihu o Te Waka a Maui*, vol 3, p 1202

688. Waitangi Tribunal, *The Ngai Tahu Ancillary Claims Report 1995*, 2nd ed (Wellington: GP Publications, 1997), p 362; Waitangi Tribunal, *Te Tau Ihu o Te Waka a Maui*, vol 3, p 1200

689. David Young, *Our Islands, Our Selves: A History of Conservation in New Zealand* (Dunedin: Otago University Press, 2004), pp 70–72

690. Park, *Effective Exclusion?*, p 85

691. Document E8, p 2

692. Michael Roche, ‘The State as Conservationist, 1920–60: “Wise Use” of Forests, Lands, and Water’, in *Environmental Histories of New Zealand*, edited by Brooking and Pawson, pp 185–187; David Young, *Our Islands, Our Selves*, pp 70, 80–84

693. Pond, *The Land with All Woods and Waters*, pp 4–5

694. Document D7, p 129

generally failed to take action. As early as the 1940s, the Crown was aware that pollution was not merely a public health issue, but was affecting fisheries in Tauranga Moana.<sup>695</sup> Still Tauranga's sewage continued to be poured into the harbour, untreated, until the late 1960s.<sup>696</sup>

Tony Nightingale has concluded that '[t]he Crown was aware of, and did nothing to halt, the systematic sewerage pollution of inner harbour shellfish beds . . . until at least the 1950s'.<sup>697</sup> In our view, the legislation prior to the 1950s was fragmentary and ad hoc.<sup>698</sup> The Crown did no more than sporadically investigate complaints about the pollution of Tauranga Harbour and other waterways. Crown officials invariably found such complaints well founded, but generally lacked the effective capacity or legislative backing to enforce compliance or monitor local body behaviour.

The Water Pollution Act 1953 (which established the Pollution Advisory Council) was ineffective until the 1963 Water Pollution Regulations gave that council the power to classify water. Māori were consulted in the preparation of water classification schemes, and seized on this instrument as a means to protect the mauri of waterways and the health of shellfish beds. However, they had limited success. Local councils opposed their efforts to prevent municipal sewage discharges into the harbour, and changes in water classification were frequent. There were virtually no controls over agricultural discharges over this period. The evidence presented to this Tribunal suggests that there was little effective control of water pollution until the 1970s, and that even until the 1990s, this control was only intermittently exercised.

The municipal sewerage schemes selected for Tauranga, Mount Maunganui, and Katikati, in particular, all ignored widespread Māori protest over the decisions to discharge effluent into waterways. Consultation and negotiation either did not take place or were token efforts. Māori were excluded from decision-making processes and the management of the schemes. The cultural impact of the schemes was not considered, and the spiritual relationship Māori enjoyed with the ocean and the resources it offers has been adversely affected.

The Mohaka ki Ahuriri Tribunal concluded that, 'the Crown was tardy – by several decades – in beginning to take effective measures to address the problems of environmental degradation'.<sup>699</sup> It was the same story with pollution of waterways: 'the Crown was simply late in adopting appropriate controls, rather than totally neglectful of its Treaty responsibility'.<sup>700</sup> In our inquiry, too, it is clear that the Crown was aware of severe problems associated with pollution in and around Tauranga Moana much earlier than it moved to solve them, and its belated actions were ineffective. The pollution of the ocean and water-

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695. Ibid

696. Ibid, p 145

697. Document A39, p 83

698. A number of Acts were concerned with pollution of harbours and waterways. Initially, these included the Fisheries Act 1908, the Health Act 1920, and the Municipal Corporations Act 1933.

699. Waitangi Tribunal, *Mohaka ki Ahuriri Report*, vol 2, p 636

700. Ibid, p 637

ways has limited the availability of resources, affected the mauri of the waters, and heightened the need to protect customary fisheries.

As was the case with pollution, there was clear evidence from the nineteenth century onward that over-fishing could exhaust Tauranga's inshore fisheries to the point of collapse. The Crown did at times move to limit commercial fishing to conserve fish stocks, but the unanimous evidence of the claimants is that fish stocks have declined dramatically during the twentieth century. As noted above, the Crown steadfastly refused to allow Māori to exercise any control over fisheries, instead taking it upon itself to regulate fishing in Tauranga Moana. However, these regulations were not adequately enforced, and Māori customary fisheries have suffered as a result.

The Crown was also slow to act on evidence of the degradation of wetlands and estuaries. This was an area where the Crown had every reason to elicit Māori views; Māori had long experience of these environments, depended on their ecosystems, and their culture and identity were deeply entwined with them.<sup>701</sup> The Crown could have incorporated their perspectives into its decision-making, especially as it took many decades for scientists to appreciate the ecological significance of wetlands and estuaries (for maintaining fish populations, for example). But instead, as witnesses described, their knowledge of the ecology of Tauranga Harbour's wetlands and estuaries was ignored. Europeans cared little for the habitats of these environments, seeing them simply as impediments to production. Such dreams as that of the harbour board chairman for a Waikareao Estuary 'deepened by digging, dredging or pumping out the sand' through 'an elaborate and comprehensive scheme' left little room for the estuary's existing ecosystems. In the event, the Waikareao Estuary has suffered pollution from surrounding urban development, discharge from the council's Chapel Street sewerage plant, and from the Kōpūrereroa Stream, which is severely polluted by agricultural runoff, rubbish tip seepage, and industrial wastes.<sup>702</sup>

If Māori values and knowledge had been accorded more respect, perhaps the fate of this estuary might have been different. More generally, perhaps more than one per cent of the wetlands of the Bay of Plenty might remain, and the fisheries of Tauranga Moana might better resemble the rich bounty recalled by the witnesses who appeared before us. Instead, their values and knowledge were marginalised.

The claimants have stressed that the period after the Second World War is particularly significant, because it set the pattern for subsequent development. They believe that in this period 'the Crown set the kaupapa for the development of Tauranga and nowhere in that plan did it provide for the mutuality required by the Treaty.'<sup>703</sup> We agree. We note that the Crown was directly involved in the development of Tauranga from the 1950s. It

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<sup>701</sup>. Document D7, p 68

<sup>702</sup>. Document A25, p 215; doc D7, p 68

<sup>703</sup>. Document U31, p 36



closely supervised the initial development of the port at Mount Maunganui, for example. Subsequent decisions to develop Sulphur Point were taken by the harbour board, in which the Crown had vested its authority to manage the harbour. We do not discount that decisions taken to develop the twin ports provided all the people of Tauranga Moana with economic benefits – including employment opportunities. But, as we have seen, they also detrimentally affected Tauranga Māori interests in natural resources – in particular in various fisheries and mātaitai. Māori had no voice in the decisions that led to these developments. No redress was provided for their losses.

### **(2) Treaty analysis and findings**

Tauranga Māori repeatedly conveyed to the Crown expressions of their frequent concerns about the effects of development on fisheries and waterways. The Crown cannot therefore claim ignorance of their concerns. Nor can it claim that it had no viable options or resources for addressing those concerns, or that these concerns were not well founded. The ease with which the Crown successfully dealt with Māori concerns over the mussel beds opposite Katikati is telling: the Governor issued an Order in Council banning the commercial taking of mussels from the location in 1930. A decade later the resource had completely recovered.<sup>704</sup> If and when the Crown so chose, therefore, it could have protected Māori interests in fisheries, often at little cost or effort.

Only slowly did it take an interest in doing so. Following the *Mohaka ki Ahuriri Report*, we thus find that ‘the Crown was simply late in adopting appropriate controls, rather than totally neglectful of its Treaty responsibility.’<sup>705</sup> The plain conclusion is that the Crown did not place proper priority on the interests of its Treaty partner. The Crown breached the Treaty principle of reciprocity and its duty of active protection by failing to safeguard the legitimate Treaty interests of Tauranga Māori. Crown control over natural resources, and the destruction of forests and fisheries permitted by the Crown, left Tauranga Māori unable to sustain their traditional way of life, and unable to utilise natural resources as a base for economic development. In leaving Tauranga Māori in this position, the Crown breached the principle of options, and has failed to provide adequate redress.

## **7.8.4 Are Tauranga Māori now able to exercise rangatiratanga over their natural resources and taonga?**

### **(1) Discussion of the facts**

Both the claimants and the Crown agree that the legislative regime now governing environmental management has better provisions for Māori participation. In particular, there

<sup>704</sup>. Document D7, p 103

<sup>705</sup>. Waitangi Tribunal, *Mohaka ki Ahuriri Report*, vol 2, p 637

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## 7.8.4(1)

is agreement that the Crown has introduced substantial measures to provide for Māori to manage customary fisheries. Crucially, Tauranga Māori can now establish fishing areas where they hold and exercise authority. Tauranga Māori still think it is over difficult to establish these areas, and remain concerned that these measures are not sufficiently resourced. We are heartened, however, that the Ministry is aware that improvements are needed to reflect their obligations at law and under the principles of the Treaty.<sup>706</sup> We do not make any findings of Treaty breach in regard to the current customary fishing regulations. We encourage the Crown and claimants to continue working together to resolve outstanding issues, particularly the need to strengthen iwi and hapū capacity and resourcing.

The truly substantive issue stimulating Tauranga Māori concern over the future of fisheries is their role in the ongoing control and management of Tauranga Moana and the wider environment. Local authorities now largely control and manage this wider environment, acting under resource management legislation. Whereas the Crown argues that this resource management legislation is now ‘consistent with Treaty principles’, and gives ‘significant protection to Māori interests’, the claimants argue that it still falls short of providing for the Treaty guarantees. The claimants argue they do not have rangatiratanga, and are not adequately involved in decision-making and planning processes.<sup>707</sup> The local authorities simply note that, whether or not the law complies with the Treaty, they are bound to implement it.

The crucial point of difference here is the rightful role of Māori in the management of their taonga. Are Tauranga Māori to have rangatiratanga, and decide how their taonga are managed, or are they merely to be consulted by the decision-makers?

Several previous Tribunals have found that the Resource Management Act as it then was did not provide for rangatiratanga. The *Ngawha Geothermal Resource Report* concluded in 1993 that the Act was ‘fatally flawed’ because it does not require decision-makers to act in conformity with, and apply, Treaty principles. It stressed that the language used by the Act’s provisions meant that the Crown’s Treaty obligations could not be given proper priority.<sup>708</sup> Though the Crown has since amended the Act, those amendments still do not address the principal concerns outlined in the *Ngawha Report*.

As stressed in the *Ngawha Report*, the key provisions of part 2 of the Resource Management Act use comparatively weak language. In particular, section 8 (by which persons exercising powers and functions under the Act must only ‘take into account’ the principles of the Treaty) is a weak provision. It is weaker than the language used in sections 6 and 7, where decision-makers are to respectively ‘recognise and provide for’ and ‘have particular regard to’ various matters, some of which are relevant to Māori. It is also weaker than

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706. Document T13, p 19

707. Document U29, p 13; doc U31, p 39

708. Waitangi Tribunal, *Ngawha Geothermal Resource Report*, pp 146–147

the language used in other Acts that make reference to the Treaty, such as the Conservation Act, which requires decision-makers to ‘give effect’ to the principles of the Treaty.

This weakness is reflected in case law, which suggests that though decision-makers must be able to show that they have found a balance between section 8 and other matters being considered, section 8 itself may often not impose any further obligations on decision-makers other than those listed in sections 6(e) and 7(a) of the Act.<sup>709</sup> As *He Maunga Rongo* found, the partnership principle, which rests on the accommodation between kawanatanga and rangatiratanga, therefore cannot be weighed in the balance.<sup>710</sup> That report also noted that kaitiakitanga ‘can exist only where there is rangatiratanga, because they are inextricably linked’.<sup>711</sup>

We note, in our inquiry, that the Crown submitted that it ‘has taken into account other views about Treaty of Waitangi consistency by panels of the Waitangi Tribunal but is not persuaded that amendment of Part 2 of the RMA is warranted’.<sup>712</sup> If the Crown itself does not find that the requirement to ‘take into account’ is persuasive language, can it expect its delegates to do so?

The Crown cannot avoid its Treaty obligations by delegating powers, but is bound to preserve and pass on those obligations to its delegates. We accept, in this inquiry, that the local authorities are now aware of their obligations to Māori under the Resource Management Act, and are endeavouring to meet these. Obligations under the Act, of course, are not yet Treaty obligations. Nevertheless, we wish to record, at this point, our appreciation for the efforts to date of Environment Bay of Plenty and Tauranga City Council (in particular) in coming to terms with the need to engage with Māori. We are aware that this change has not progressed as fast as Tauranga Māori desire. We are also aware that it has not been easy for the local authorities, given the lack of previous engagement, and the lack of Crown direction.

However, even in this inquiry area, where local authorities are performing to a comparatively high standard, the evidence presented has established that significant issues remain. The experience in Tauranga Moana therefore provides something of a test case to highlight a range of remaining problems with the Resource Management Act in both theory and practice, as a means of discharging the Crown’s obligations to Māori.

Under the Resource Management Act it is entirely up to local authorities whether they transfer or share their powers of management with Māori. On their own submissions, the local authorities in Tauranga Moana do not regard themselves as Treaty partners. They are

<sup>709.</sup> *Haddon v Auckland Regional Council* [1994] NZRMA 49. For the proposition that s8 adds little to the requirements of ss6(e) and 7, see for example *Takamore Trustees v Kapiti Coast District Council* [2003] 3 NZLR 496, 497.

<sup>710.</sup> Waitangi Tribunal, *He Maunga Rongo*, vol 4, p1408

<sup>711.</sup> *Ibid*

<sup>712.</sup> Document U29, p14

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yet to transfer to Tauranga Māori, or to adequately share with them, any of their jurisdictions over natural resources, despite requests to do so (as in the cases of Mauao and the Wairoa River).

For a transfer or share of functions, powers, or duties to occur under sections 33 or 36 of the Resource Management Act it must be considered desirable on all three grounds. These grounds are, first, that the authority to which the transfer is made represents the appropriate community of interest relating to the transfer; secondly, efficiency; and thirdly, technical or special capability or expertise.<sup>713</sup>

The local authorities did not explain to us their reluctance to transfer to, or share their powers with, Tauranga Māori. However, though not specific to Tauranga, considerable research has been conducted into why no transfers to Māori have occurred which suggests a range of issues have played a part.<sup>714</sup> A particular problem, for example, is lack of guidance for both Māori and councils in how to approach making and assessing applications. This is clearly an area where greater Crown guidance would be helpful. Another problem is the question of whether Māori management would ever be more efficient, or technically capable. Yet, while iwi do not always have the technical expertise or resources to administer natural environments, many councils no longer retain this expertise either. Instead, they contract various organisations and companies to provide services. There is nothing to prevent iwi doing the same, funded by a transfer of rates or the power to charge fees in exchange for exercising management. In sum, we see no especial reason why iwi in Tauranga Moana should not exercise some of the management functions, powers, and duties in respect of their taonga, in respect of which they clearly are an appropriate community of interest with some special capabilities.

One indication of reluctance to transfer or share powers that is specific to Tauranga is provided by the signal in the SmartGrowth strategy of 2004 that iwi and hapū management plans are preconditions for this to occur. This suggests that all local authorities in Tauranga place great significance upon these plans. However, the Crown's provision for Māori iwi management plans to be considered in planning processes is weak. Although the 2003 amendment to the Resource Management Act strengthened the status of iwi management plans, so that authorities must now 'take into account' an iwi plan, they still have a much lesser status than regional or district plans. Regional and district plans must be mutually consistent; not so for iwi management plans. Further, there is no requirement to pay any attention to iwi management plans in resource consent processes.

The Resource Management Act does not specify the procedures for producing iwi management plans. They are consequently produced on a fairly ad hoc basis, as and when

713. Resource Management Act 1991, ss 33(4)(c)(i)–(iii), 36B(1)(b)(i)–(ii)

714. See for example Elizabeth Clark, 'Section 33 of the Resource Management Act 1991' in *Local Government and the Treaty of Waitangi*, edited by Janine Hayward (Melbourne: Oxford University Press, 2003), pp 43–54.

funding becomes available. The Crown has provided little funding to Tauranga Māori. We are aware that Environment Bay of Plenty has made efforts to redress this issue – as have other local authorities, to a much lesser extent – but we do not consider the sums involved to be anything like sufficient. If these plans are to be taken seriously as aids to planning, they must be comprehensive and carefully produced. This requires proper funding, as the authorities must know from their experience of producing their own planning material. Tauranga Māori will never truly uphold their rangatiratanga if they can only react to the plans that others have for environments and resources.

Those Tauranga Māori with skills in resource management are making enormous efforts to meet the requirements of the local authorities, and to try to have the voice of their people heard. The rates of remuneration make it clear that this burden has been shouldered for love, rather than for money. This is testimony to the earnest desire of Tauranga Māori to participate as kaitiaki in shaping the direction of development in their ancestral landscape. Currently, however, instead of exercising rangatiratanga and acting as kaitiaki by making decisions and participating in the shaping of district planning, Tauranga Māori exhaust themselves in fighting rear-guard battles against resource consents. But without adequate resources, this enthusiasm cannot be maintained, and we noted several cases where frustrated Tauranga Māori had begun to disengage.

## **(2) Treaty analysis and findings**

The Crown's resource management legislation is still not being implemented in a manner consistent with the principles of the Treaty. It has not, in practice, as yet provided for a true partnership with Tauranga Māori. It has not adequately provided for Māori to exercise rangatiratanga and kaitiakitanga. The understandable result has been that some Tauranga Māori have become so frustrated that they themselves are no longer engaging with local authorities in the necessary spirit of good faith, and willingness to compromise, that must characterise the Treaty partnership.

Most significantly, the provisions through which Māori can regain authority over their taonga through this legislation are not being utilised in Tauranga Moana. The iwi and hapū of Tauranga Moana are not adequately involved in the decisions that determine the fate of their taonga. Moreover, with the exception of Environment Bay of Plenty, they are not represented as of right on the bodies that do make those decisions. Their values are still routinely weighed by decision makers against a wide range of other interests and, almost as routinely, the result is decisions that fall short of providing active protection for rangatiratanga.

In short, the provisions of the Resource Management Act do not guarantee that those exercising powers under the Act do so in a manner consistent with the Treaty, and in practice Māori have been generally unable to become one of the bodies that exercise those

powers. In allowing this to occur the Crown is in breach of the principle of partnership, and of its duty of active protection of Māori rangatiratanga.

Previous Tribunals have found that the Act ought to be amended to address these shortcomings. This is certainly one way in which the Crown could better ensure its delegates comply with its Treaty obligations. But it is not, we believe, the only way. In our view, the real issue with the Act, as it stands, is that the existing legislative provisions for Māori to exercise rangatiratanga and act as kaitiaki are not being properly implemented. In particular, after almost 20 years there has still not been a single instance of a transfer of powers to iwi. Nor, in Tauranga, has there been an explicit instance of joint management under section 36. There have been very tentative movements towards allowing Māori to participate in management functions and powers, but these fall far short of Māori aspirations, and do not reflect a true partnership. Clearly, given such a history, the provisions relating to Māori management or joint management or resources cannot be left solely at the discretion of local authorities. We find that much more active Crown oversight is required if such transfers or sharing or powers are to occur. We find that they must occur, if the Crown is to avoid further breaches of the principle of partnership and its duty of active protection. As demonstrated by the history of customary fisheries, the Crown has a legacy of passing legislative provisions that would enable a measure of Māori rangatiratanga over their property and taonga, only to then leave the provisions unsupported and unpromoted so that they are never utilised. In such cases, as found by the *Manukau Report*, '[t]hose words mean nothing'.<sup>715</sup>

The principle of partnership and the duty of active protection oblige the Crown to ensure that under its legislation Māori can – and do – exercise rangatiratanga over their taonga. The Crown must actively work with tangata whenua and local authorities to identify which natural resources and environments in Tauranga Moana will most help to restore tribal rangatiratanga over their taonga, and are suitable for a shift in the management regime.

Where the wider public also have a strong interest in taonga, as is the case most obviously with Tauranga Moana, significant waterways, and the forests of the Kaimai Range, it is most appropriate to explore the possibilities for joint management. In any event, Māori themselves may prefer to work jointly with local authorities while they develop their capacities and expertise. We do not wish to specify what forms such management arrangements must take; that is a matter for negotiation between the affected parties. We reiterate only that the Crown has a key role to play in facilitating any such arrangements.

The current shortfalls in funding iwi and hapū management plans in Tauranga Moana is a further critical problem, and one that is primarily the Crown's responsibility to redress.

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715. Waitangi Tribunal, *Manukau Report*, p 81



Working in partnership with local authorities and tangata whenua, the Crown ought to ascertain the range of expertise and funding required for all iwi and hapū within the inquiry district to produce a management plan that is capable of being fully taken into account by the relevant district planning documents.

It is also the Crown's responsibility to work with Tauranga Māori and local authorities to gauge what Tauranga Māori require in order to contribute meaningfully to ongoing resource consent processes. Several witnesses with considerable experience in resource management and planning pointed to the need for a dedicated specialist unit to provide planning services to tangata whenua in Tauranga Moana. We believe this is an appropriate solution. The cost of supporting such a unit might be amply repaid by reducing the number of contentious issues that are inevitably brought before the courts at present.

Only once Māori have the capacity to assume the responsibility of acting as kaitiaki over their taonga will the Crown have provided a system of resource management that allows Māori to exercise their rangatiratanga. Only then will the Crown discharge its duties, and avoid further breaches of the principles of the Treaty.

#### **7.9 MAIN CONCLUSIONS AND FINDINGS IN THIS CHAPTER**

Our main conclusions and findings in this chapter are that:

- ▶ The Treaty guaranteed to Tauranga Māori their rangatiratanga over their lands, forests, fisheries and other taonga. Holding rangatiratanga imposes an obligation upon Tauranga Māori to guard and care for taonga as kaitiaki. Where Tauranga Māori have lost ownership over taonga against their will, and in breach of the principles of the Treaty, they may retain Treaty rights to exercise rangatiratanga and kaitiakitanga over those taonga.
- ▶ The taonga of Tauranga Māori include the harbour, Tauranga Moana, significant waterways, and the forests of the Kaimai Range.
- ▶ Prior to 1991 the Crown consistently failed to recognise and provide for Tauranga Māori rangatiratanga and kaitiakitanga over Tauranga Moana, its waterways, its forests, and its fisheries, in breach of the plain meaning of article 2, and of the principle of partnership and the duty of active protection.
- ▶ The Crown permitted the pollution of waterways, and the destruction of forests and fisheries, to an extent that left Tauranga Māori unable to sustain their traditional way of life, and unable to utilise their taonga as a base for economic development. In leaving Tauranga Māori in this position, the Crown breached the principle of options, and has failed to provide adequate redress.

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- ▶ Since 1991 the Crown has provided mechanisms through which Tauranga Māori can potentially exercise rangatiratanga and kaitiakitanga over customary fisheries, waterways, and forests. However, in practice local bodies have been reluctant to use these mechanisms. Much more active Crown oversight is required to avoid further breaches of the principle of partnership and its duty of active protection.
- ▶ Where the wider public also have a strong interest in taonga, as is the case with Tauranga Moana, significant waterways, and the forests of the Kaimai Range, it is now most appropriate for the Crown to explore possibilities for joint management between local government and Māori.

## CHAPTER 8

### THE ANCESTRAL LANDSCAPE: CULTURAL HERITAGE, 1886–2006

We keep losing our waahi tapu and urupa. If someone bulldozed down the Mission House in Tauranga, they'd be jailed. But because our old pa, urupa and waahi tapu sites are hidden from sight, it seems to make them less important. That's not right.

Lance Waaka, Ngāti Ruahine<sup>1</sup>

#### 8.1 INTRODUCTION

##### 8.1.1 The cultural heritage of Tauranga Māori

The cultural heritage of the tangata whenua of Tauranga Moana has been accumulated over many generations as, through the lives of their tūpuna, their ancestral landscapes have gradually been woven on the loom of Tauranga's lands and waters. The heritage their ancestors have bequeathed to Tauranga Māori today includes places and things both physical and tangible, and spiritual and intangible. For some claimants, such places are now doubly precious, because the remains of their kāinga, pā, mahinga kai, and wāhi tapu are their only link to their lost ancestral lands.

Although tangata whenua are left now, in many cases, with only the remnants of their ancestral landscapes, these are not any less significant for being but vestiges. On the contrary, as Keni Piahana of Ngāi Te Ahi stressed:

Because of the erosion of the cultural landscape, the integrity of the remaining heritage sites must be retained to ensure continuity of knowledge, experience, values, life and customs of Ngai Te Ahi and other hapu.<sup>2</sup>

Speaking before the Environment Court, seeking to prevent the development, at Pāpāmoa, of 'the last remaining area there that has not been built upon', Waitaha kaumatua

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1. Lance Hori Waaka, brief of evidence, 25 September 2006 (doc s23), p 8

2. Keni Piahana, brief of evidence, undated (doc G26), p 6

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Tame McCausland evoked his people's deep sense of continued belonging to their ancestral landscape:

What remains bears witness to . . . our history and culture. There is an expression that captures what I mean: 'he noho nga kainga, he mahinga kai' (where we stayed and gathered food), 'he tanu tupapaku' (where the dead are buried), 'ka mau te whenua' (that is my land).<sup>3</sup>

Here he and his people, he said:

could get a sense of how things were. When we go there we can still feel the wairua (the spirit). We were brought up that way, to feel that the old people are with you when you go to a place like that.<sup>4</sup>

However, the ongoing development of Pāpāmoa is only the latest manifestation of the explosive post-war development that has, in many places, already transformed the landscape, and hence the cultural heritage of Tauranga Māori, almost beyond their recognition. As Huikakahu Kawe of Ngāi Te Ahi lamented to us,

we are losing our culturally identifiable footprints and our connections to significant sites. The land is being bulldozed and changed to such an extent that the relationship that we have with it is irrevocably changed. The contours of the land which we were connected with are now no longer there. We say to each other . . . 'Where has that hill gone that we used to play on? Ha, that's right, there it is.' It's now down in what used to be our swamp where houses now stand.<sup>5</sup>

Nevertheless, a wide range of both natural and cultural aspects of the ancestral landscape remain significant to tangata whenua. The relationship between people and places gains significance primarily through the bonds established by whakapapa. Over generations of ancestral occupation the mauri, wairua, and tapu of the landscape is woven ever closer with that of the tangata whenua. All significant places can therefore be thought of as wāhi tupuna, ancestral places. These include the pā of significant tūpuna, tauranga waka (canoe landing sites), marae, tupuna maunga and awa (ancestral mountains and rivers), mahinga kai (food harvesting areas), wai puna (springs), wāhi rākau (significant trees), and wāhi tāpuketia (buried taonga).

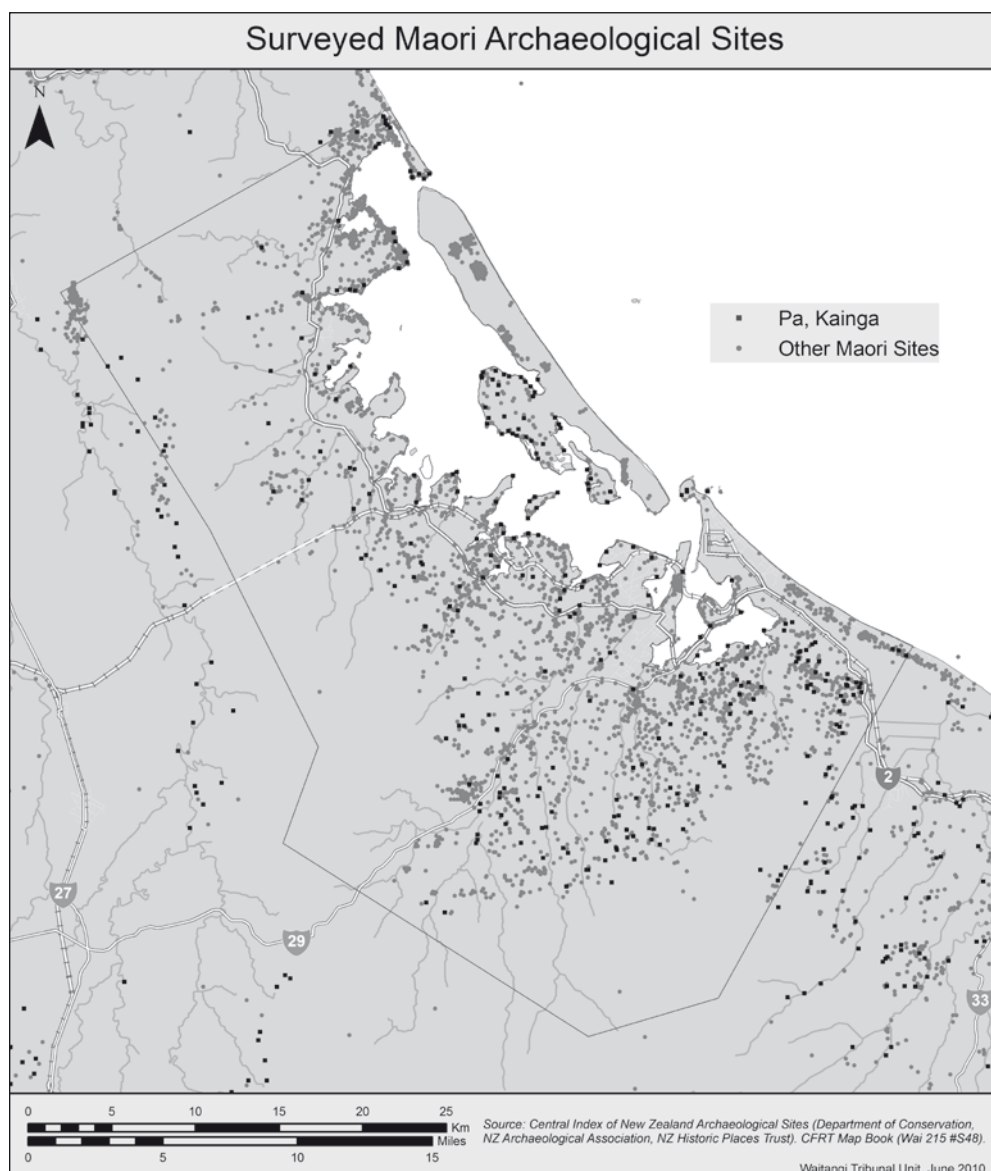
Any wāhi tupuna can have such a degree of tapu that the tangata whenua regard it as a wāhi tapu, a sacred place. Wāhi tapu can therefore be tangible or intangible, and each

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3. Thomas Abraham (Tame) McCausland, brief of evidence to Environment Court, Pāpāmoa Junction Case, 25 January 2005, pp 8–9 (attachment to Maru Tapsell, brief of evidence, 27 September 2006 (doc s33))

4. Ibid, p 9 (attachment to doc s33)

5. Huikakahu Kawe, brief of evidence, 26 June 2006 (doc R21), p 6



Map 8.1: Archaeological sites around Tauranga Moana

grouping of tangata whenua determines what a wāhi tapu is to them. But most wāhi tapu are associated with the births, deaths, and rituals that have shaped whakapapa, and are embodied in the burial places of whenua (placenta), tūāhu (shrines), baptismal places, urupā, caves, and battle sites. All such sacred places are taonga.<sup>6</sup> Ancestral objects, often found in these sacred places, are equally taonga.

6. Desmond Tatana Kahotea, 'Tangata Whenua Literature Review', report prepared for SmartGrowth, 2003, pt1, pp6–8

**8.1.2 Cultural heritage and the Treaty**

Article 2 of the Treaty in Māori extends the Crown's protection to 'o ratou taonga katoa', or all their treasures. The Te Roroa Tribunal captured the breadth of the concept when it described taonga as:

an umbrella term, inclusive of a wide range of things upon which Maori . . . place great value and regard as treasures. Among them are intangibles like spiritual values as well as tangible objects. They include the land, sea fronts, forests, lakes and rivers; also places and things associated with life and death.<sup>7</sup>

The previous chapter discussed claims regarding the wide range of taonga of the natural environment such as Tauranga Moana, forests, lakes and rivers. These are clearly part of the cultural heritage of Tauranga. In this chapter, however, we address claims concerning two specific types of taonga: tangible and portable objects, or taonga tuturu, and sacred sites of special cultural significance, such as wāhi tapu.

We are mindful throughout, however, that all these objects and sites take their full meaning from their surrounding context, the ancestral landscape, and from their connection to the people of past, present, and future. As the Hauraki Māori Trust Board submitted, taonga tuturu:

hold a special meaning, have a history, whakapapa or connectedness, not only to those past but also to the people of the present. Today we impart them with meaning, significance, and importance, hoping those qualities will endure into the future.<sup>8</sup>

The taonga of Tauranga Moana, then, are those things and places that link the tangata whenua to their shared past within their ancestral landscapes, and so help to project their collective identity into the future.

Article 2 protects Māori in the exercise of rangatiratanga over their taonga. Previous Tribunals have established that the Crown has a duty under article 2, to uphold Māori rangatiratanga over their taonga.<sup>9</sup> As the *Hauraki Report* found, Māori also retained rights to rangatiratanga over their taonga under article 3 of the Treaty, since '[a] basic tenet of citizenship is the right to protect property and chattels, including items of great personal or cultural significance.'<sup>10</sup> As found by both the Court of Appeal, and several previous Tribunals, an omission to provide these protections is as much a breach of the Treaty as a positive act that removes those rights.<sup>11</sup>

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7. Waitangi Tribunal, *The Te Roroa Report 1992* (Wellington: Brooker and Friend Ltd, 1992), p 210

8. Counsel for Wai 100 and Wai 650 claimants, closing submissions, 29 November 2006 (doc U15), p 9

9. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 4, p 1245

10. Waitangi Tribunal, *The Hauraki Report*, 3 vols (Wellington: Legislation Direct, 2006), vol 3, p 964

11. *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641 (CA)



Tauranga Māori affirmed to us that a practical expression of their rangatiratanga over their ancestral taonga is the authority and capacity to act as kaitiaki – to guard over and care for their heritage.<sup>12</sup> In our view, Māori have a right to act as kaitiaki, and participate fully in decision-making regarding all Māori historic places, wāhi tapu, and archaeological sites. Tauranga Māori face relatively few problems acting as kaitiaki, participating in decision-making, and protecting their ancestral sites, on land that they themselves own. However, very real problems can emerge in the case of land that they do not own, that is either in private or public ownership. In these situations, the Crown has further particular obligations, both to ensure its legislative provisions protect Māori taonga from damage and destruction, and to provide ways in which Māori are enabled to act as the kaitiaki over their taonga. The effectiveness of the Crown's protection of Māori cultural heritage in Tauranga Moana largely stands or falls on this basis.<sup>13</sup>

Article 3 guarantees Māori all the rights and privileges of British citizens. The principles of equity and equal treatment flow from this provision. This requires the Crown to treat Māori and non-Māori equally, impartially and fairly.<sup>14</sup> The law must therefore protect Māori in the exercise of authority over their cultural heritage, and ensure that their heritage receives equivalent protection to Pākehā cultural heritage.<sup>15</sup> This is a minimum standard against which the level of protection afforded by the Crown to Māori cultural heritage at any particular time can be judged. However, where Māori cultural heritage is particularly threatened, especially where this is due to previous Crown actions or omissions, the Crown has a heightened responsibility to meet its obligations.<sup>16</sup>

### 8.1.3 The issues: has the Crown honoured its Treaty obligations in Tauranga Moana?

In essence Tauranga Māori have made two key claims that the Crown has not honoured its Treaty obligations in Tauranga Moana. The first claim is that neither past nor present Crown legislative regimes have allowed Tauranga Māori to exercise rangatiratanga and to act as kaitiaki over the taonga of their cultural heritage. The second claim is that, in the face of the threats posed by development, the Crown has not provided adequate protection for their cultural heritage, which has been, and continues to be, desecrated and destroyed.

12. See for example counsel for Wai 664 claimants, final closing submissions, 12 December 2006 (doc U5(a)), p18; doc U15, p 4; counsel for Wai 540 claimants, closing submissions, undated (doc U31), pp 36–37; counsel for Wai 210, Wai 637, and Wai 751 claimants, closing submissions, 10 December 2006 (doc U34), p 56.

13. As Harry Allen argues, '[t]he effectiveness of any heritage protection regime consequently lies in the interplay between legislative controls and private property rights'. See Harry Allen, 'Protecting Historic Places In New Zealand', *Research in Anthropology and Linguistics*, no 1 (1998), p 5.

14. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wellington: Legislation Direct, 2004), p 133; Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1247.

15. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, pp 133–134.

16. *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 at 517.

The Crown does not accept these claims. It has submitted that it is ‘not surprising’ that rapid growth in Tauranga, an area dense in archaeological sites, has had a ‘significant impact on the destruction of archaeological and Māori cultural heritage.’<sup>17</sup> It argued that the Crown must strike a balance between allowing development, and protecting archaeological sites.<sup>18</sup> Such a balance, it submitted, is consistent with Treaty principles.<sup>19</sup> The Crown did not directly address the question of whether or not it had always succeeded in striking such a balance. It noted only that ‘[t]he importance of protecting cultural heritage sites . . . has been recognized for some time’, though it conceded that past measures provided protection ‘in less comprehensive ways to those now available.’<sup>20</sup> In the main, however, the Crown’s submissions focused on illustrating the comprehensive nature of current legislation, including the Antiquities Act 1975, amended in 2006 to become the Protected Objects Act 1975, the Resource Management Act 1991, and the Historic Places Act 1993.

These Acts have devolved much of the Crown’s responsibility for protecting the cultural heritage of Tauranga Māori to local authorities. The local authorities in Tauranga, however, submit that they are not Treaty partners, and are not obliged by past or present legislation to give effect to the Treaty. Any deficiency in meeting the Crown’s Treaty obligations they argue ‘does not belong to those who implement [the law], but to those who write it.’<sup>21</sup>

To provide context for our assessment of the merits of these positions, we examine the stories of six culturally significant places in Tauranga Moana, from the nineteenth century to the present day. First, however, we summarise key developments in the Crown’s legislative regime over that period. We begin with the development of legislation protecting sites of significance in the ancestral landscape, in particular wāhi tapu, before outlining past and present provisions regarding taonga tuturu – movable cultural treasures. Finally, having outlined the submissions of all the parties, we provide in section 8.6 our discussion, analysis, and findings on the issues before us.

Our discussion distinguishes the Crown’s actions before and after the establishment of the key current legislative framework that now governs the management of cultural heritage in New Zealand. This framework is primarily a function of the interaction of the Resource Management Act 1991, and the Historic Places Act 1993. Accordingly, we address the two key claims before us through discussing four issues:

- Has the Crown provided for the rangatiratanga and kaitiakitanga of Tauranga Māori over their cultural heritage?
- Does the Crown bear any responsibility for destruction and desecration of the cultural heritage of Tauranga Māori?

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17. Crown counsel, closing submissions on issue 5, 8 December 2006 (doc U29), p 36

18. Ibid, pp 36–37

19. Ibid, p 37

20. Ibid, p 31

21. Counsel for local authorities, closing submissions, 12 December 2006 (doc U39), pp 5–6

- Can Māori now exercise rangatiratanga and kaitiakitanga over their cultural heritage?
- Does the Crown now adequately protect Māori cultural heritage?

## 8.2 CROWN LEGISLATION

### 8.2.1 The development of heritage legislation

The Historic Places Act 1954 was the first legislation specifically designed to help protect the places that Māori regard as culturally significant. It sought to preserve and record places and objects of historic or archaeological interest – including those associated with Māori, and their history, legends and mythology. A non-governmental organisation, the Historic Places Trust, was established to oversee the Act. It was to undertake preservation and protection work by forming voluntary agreements with local government, corporations, or individuals; it could also acquire sites or objects through purchase or lease, or as gifts.<sup>22</sup>

In 1975, an amendment to the Act was passed protecting archaeological sites from modification, damage, or destruction; none could occur without the trust's explicit consent.<sup>23</sup> This significant step reflected growing concern amongst the archaeological community about the unrecorded destruction of New Zealand's archaeological sites, the vast majority of them Māori sites. That said, the legislation was primarily designed to ensure archaeologists could retrieve information from sites. As Harry Allen has noted, the Act equated the heritage value of a site with its information content; that value could therefore be preserved by archaeological excavation before modification or destruction.<sup>24</sup> The vast majority of archaeological sites in Tauranga are Māori sites. These places are valued by Māori as imprints of their ancestors upon the landscape; such values are best preserved by protecting ancestral places as and where they are – and they cannot in any way be preserved by archaeological excavation.

Despite an emphasis on archaeological information, rather than on the values important to Māori, the Act's comprehensive nature did offer an important *prima facie* protection to all archaeological sites. However, no such protection was afforded to sites that were important to Māori but might not be of archaeological interest, such as wāhi tapu or maunga tupuna. To be considered an archaeological site, a place must contain physical evidence of human activity; true of some wāhi tapu, but by no means all.<sup>25</sup> Unlike archaeological sites, therefore, wāhi tapu gained only incidental legislative protection, depending on the status of the land where they were located. If Māori owned the land concerned (either as Māori

22. Document U5(a), p 21

23. Ibid

24. Allen, p 36

25. Waitangi Tribunal, *The Hauraki Report*, vol 3, p 943; Richard McGovern-Wilson, brief of evidence on behalf of the New Zealand Historic Places Trust, 26 October 2006 (doc T24), pp 6–7

customary or general land), they usually chose to protect wāhi tapu under section 439 of the Māori Affairs Act 1953.<sup>26</sup> This allowed the Native Land Court to recommend reservation of the land, and required only limited disclosure of information to the public.<sup>27</sup> These provisions were retained in Te Ture Whenua Māori Act 1993.

But where wāhi tupuna such as wāhi tapu, pā sites, and other culturally important places were located on land no longer owned by Tauranga Māori – as is common in Tauranga – it was a different story. As discussed in the previous chapter, Māori relationships with their ancestral lands were acknowledged by the Town and Country Planning Act 1977, but this relationship was confined to lands that they owned until 1987. A further particular problem for Tauranga Māori was that many of their most significant places have been (and are) managed by local authorities under the Reserves Act 1977, which covered many kinds of public reserves: historic, recreational, scientific, and scenic, as well as nature reserves. The Act requires local authorities (who often own the reserves, which are therefore private land managed for public purposes) to develop management plans reflecting the reserves' primary purpose, which must be approved by the administering Department (since 1987, the Department of Conservation).<sup>28</sup> None of the statutory reserve purposes, however, made any mention of Māori.

'Traditional sites' such as wāhi tapu remained effectively unprotected until the Historic Places Act 1980. It empowered the Historic Places Trust to recommend proposals to any appropriate Māori authority for recognition and preservation of such sites. The trust was also empowered to maintain a register of archaeological sites, and to grant permits to those seeking to investigate, modify or destroy them; it was an offence to proceed without a permit. The trust could also require territorial authorities to record registered archaeological sites in district planning schemes. The Act made no reference to the Treaty.

The move to integrate heritage protection with district planning gained more momentum under the Historic Places Act 1993, which was intended to work in tandem with the Resource Management Act to fully protect Māori cultural heritage. Indeed, the Historic Places Act does not define the heritage it is designed to help protect, rather the Resource Management Act does. Historic heritage there defined 'means those natural and physical resources that contribute to an understanding and appreciation of New Zealand's history and cultures', deriving from a range of qualities (for example archaeological, cultural and historic), and includes (i) historic sites, structures, places, and areas; (ii) archaeological sites; (iii) sites of significance to Māori, including wāhi tapu; and (iv) surroundings associated with the natural and physical resources.<sup>29</sup>

26. Desmond Tatana Kahotea, 'Western Bay of Plenty Urban Development Strategy Study: Taha Maori/Māori perspectives', May 1986 (doc A16), p 25

27. Waitangi Tribunal, *The Te Roroa Report* 1992, p 231

28. Reserves Act 1977, ss 3, 41

29. Resource Management Act 1991, s 2

Since their inception, both Acts have required all persons exercising functions and powers under them to recognise '[t]he relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga'.<sup>30</sup> This is part of the purpose of the Historic Places Act and, as discussed in previous chapters, is a matter of national importance under the Resource Management Act which must be recognised and provided for. Both Acts have since been amended on a number of occasions, very often in an effort to further their integration. However, it is important that, before discussing these developments, we first set out the essence of the statutory framework as established in the early 1990s.

The trust continues its key dual roles of being the regulatory body responsible for protecting archaeological sites, and of maintaining the historic places register. It remains an offence to damage, destroy, or modify an archaeological site without trust approval, which can only be obtained through what is essentially a consent process.<sup>31</sup> Applicants must provide an assessment of the site's archaeological and Māori values and how the proposed work will affect them, and also describe the consultation undertaken with Māori (or explain why there was none). The trust may grant the authority to destroy the site in full or in part – possibly with conditions, such as requiring an investigation to gather archaeological information – or decline the application if the site's archaeological or Māori cultural values are sufficiently significant.<sup>32</sup> In Tauranga, the regional archaeologist and pouarahi (Māori heritage adviser) each independently assess these values. In all cases, the final decision is made on the recommendation of the trust's senior archaeologist.<sup>33</sup>

The statutory purpose of the historic places register is to inform the public about historic places and areas of significance, to notify property owners and, crucially, to help registered places gain protection under the Resource Management Act. The register has a very broad set of criteria for what may constitute a historic place or area. According to section 23(1) of the Historic Places Act, the trust may register any place or area that 'possesses aesthetic, archaeological, architectural, cultural, historical, scientific, social, spiritual, technological, or traditional significance or value'. Places are assigned either a category I or II ranking, where category I places have special or outstanding historical or cultural heritage significance or value.<sup>34</sup> Criteria used for ranking include the importance of the place to tangata whenua, and the importance of identifying places of early settlement in New Zealand. Historic areas, wāhi tapu, and wāhi tapu areas are not categorised in this way.

The register specifically recognises separate categories of places that are significant to Māori, including, wāhi tapu and wāhi tapu areas. Wāhi tapu are described in the Act as

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30. Historic Places Act 1993, s 4(2)(c)

31. Parliamentary Commissioner for the Environment, *Historic and Cultural Heritage Management in New Zealand* (Wellington: Parliamentary Commissioner for the Environment, 1996), pp 39, 63

32. Document T24, pp 16–18

33. Ibid, p 16

34. Historic Places Act 1993, s 22(3)(a)(ii)(iii)

places ‘sacred to Maori in the traditional, spiritual, religious, ritual, or mythological sense’. Wāhi tapu areas are simply land containing one or more wāhi tapu.<sup>35</sup>

The Māori Heritage Council has the statutory responsibility to decide on all applications to register wāhi tapu and wāhi tapu areas. As the above description indicates, wāhi tapu are not prescriptively defined in the Act; it is left to particular iwi and hāpu to decide what constitutes a wāhi tapu for them. In considering applications, the Māori Heritage Council requires only that sufficient information is available to register the place, and it has accepted a wide variety of places on to the register – for example, burial places, places where baptismal rights were performed, tūahu (shrines), battlegrounds, and waiora (healing) springs.<sup>36</sup> The council’s other functions include assisting the Historic Places Trust to develop and reflect a bicultural view in the exercise of its powers and functions, assisting whānau, hapū, and iwi in the preservation and management of their heritage resources, and considering recommendations in relation to archaeological sites.<sup>37</sup>

It is crucial to understand that simply being on the register does not in itself provide any protection whatsoever to a place. This is rather a task for the relevant local authority under the Resource Management Act. In developing their policies and plans under the Act local authorities must ‘have regard to’ the historic places register.<sup>38</sup> In addition, the Māori Heritage Council may recommend how local authorities should help conserve and protect wāhi tapu areas (though not, oddly, wāhi tapu). Local authorities must have ‘particular regard’ to these recommendations.

The trust can provide some protection for historic places by entering into heritage covenants – agreements made between a property owner and the trust that certain restrictions will be placed on the use of the property in perpetuity, regardless of ownership. Covenants are generally only made therefore with the approval and participation of the property owner, though local authorities have in rare instances required them as a condition of a resource consent. Nationally, five Māori pā are protected by covenants.<sup>39</sup>

Finally, the Historic Places Act also provides for heritage orders, though the meaning and effect of these is actually spelt out in the Resource Management Act, to which we will shortly turn.

In summary, the Historic Places Act is administered by the Historic Places Trust. The Act’s primary protection mechanisms relate to archaeological sites, most of which are a result of Māori ancestral occupation, and over which the trust administers what is effectively a consent process. The trust can also help negotiate covenants, but these are voluntary,

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35. Historic Places Act 1993, s 2

36. Document T24, p 24

37. New Zealand Historic Places Trust, ‘Maori Heritage Council’, New Zealand Historic Places Trust, <http://www.historic.org.nz/en/AboutUs/MaoriHeritageCouncil.aspx> (accessed 23 March 2009)

38. Document T24, pp 23–24

39. New Zealand Historic Places Trust, ‘Heritage Covenants’, New Zealand Historic Places Trust, <http://www.historic.org.nz/ProtectingOurHeritage/Covenants.aspx> (accessed 21 October 2009)



or impose heritage orders, but (as we will see) these are potentially very costly. Otherwise, this legislation primarily functions to collate information to be fed into the planning processes conducted under the Resource Management Act.

As originally enacted in 1991, the Resource Management Act did not provide strong protection to heritage. It provided only that heritage values were one of a range of ‘other matters’ to which decision makers are to have particular regard. However, it did contain a range of further provisions in part 2 which were more or less directly concerned with Māori heritage protection, many of which have been more fully discussed in previous chapters. To summarise: decision makers under the Act were to recognise and provide for the relationship of Māori to their ancestral lands, waters, wāhi tapu, and taonga as a matter of national importance, have particular regard to kaitiakitanga, and take account of the principles of the Treaty. Other provisions in the main body of the Act meant Māori could further influence plans made by decision makers by producing iwi management plans, and could in theory become decision makers themselves, through the transfer of powers.

These directives inform part of local authorities’ approach to fulfilling the purposes of the Resource Management Act set out in part 2 of the Act. This approach typically involves local authorities having objectives, policies, and rules in their planning documents regarding heritage management, which are then applied to lists of scheduled heritage items.<sup>40</sup> Local authorities can thereby regulate what sorts of effects on these heritage items are not permitted or may require various degrees of control.

The most explicit, direct, and strongest form of heritage protection, however, is provided by heritage orders. Under the Resource Management Act, heritage orders can protect ‘[a]ny place of special interest, character, intrinsic or amenity value or visual appeal, or of special significance to the tangata whenua for spiritual, cultural, or historical reasons.’ They can also protect ‘[s]uch area of land (if any) surrounding that place as is reasonably necessary for the purpose of ensuring the protection and reasonable enjoyment of that place.’<sup>41</sup> Nothing can be done that might nullify the effect of a heritage order – including subdivision, or change in the character, intensity or scale of land use, or the alteration of buildings or land through removal, demolition or excavation – without the consent of the heritage authority named in the plan.<sup>42</sup>

Heritage authorities include ministers of the Crown and local authorities, acting either on their own initiative or on the recommendation of an iwi authority, the trust, as well as approved body corporates, which can include incorporations and trusts established under Te Ture Whenua Māori Act 1993, and Māori Trust Boards.<sup>43</sup>

40. Robert McClean, *Historic Heritage Research Paper No 2: National Assessment of District Plan Heritage Provisions*, (Wellington: Historic Places Trust, 27 January 2009), p 4

41. Resource Management Act 1991, s189

42. Ibid, s193

43. Ibid, s187; Historic Places Act 1993, s5



To date no Māori organisations of any sort have become heritage authorities, despite at least one request having been made by an iwi authority. As far as we can ascertain, the problem has been that the Minister for the Environment has not been willing to accept that the applicant is the appropriate body for protecting a particular place, and can carry out the responsibilities of an authority.<sup>44</sup> These include financial responsibilities such as paying costs to the owner of the place protected by the order, and costs to process resource consent applications for use of the place. We note, however, that five non-Māori body corporates have succeeded in becoming heritage protection authorities.<sup>45</sup>

Most significantly, while no compensation is available for people with an interest in land affected by regulation under the Resource Management Act, under section 85 land owners may lodge an appeal to the Environment Court against planning changes that render their property ‘incapable of reasonable use’.<sup>46</sup> Heritage authorities are typically advised that imposing a heritage order will leave them liable to a claim for compensation under this provision. For this reason, local authorities and the Historic Places Trust have been very reluctant to impose heritage orders.<sup>47</sup>

Finally, in addition to managing heritage through regulation, local authorities can also provide incentives for property owners to protect heritage.<sup>48</sup> Available incentives (already in use in some districts) which are relevant to the protection of sites such as wāhi tapu, include:

- ▶ partial rates relief for properties including heritage items, including where heritage orders have been applied;
- ▶ waiving consent application fees and financial contributions;
- ▶ free advice from archaeologists or other suitably qualified persons regarding preparing management and conservation plans for archaeological sites and wāhi tapu; and
- ▶ access to fencing funds for the protection of archaeological sites.<sup>49</sup>

In the late 1990s a succession of highly critical official and unofficial reviews found that the statutory heritage management regime was not serving Māori at all well. It is important that we briefly examine the findings of these reviews, since they provide an important context for assessing the Crown’s subsequent amendments to the heritage management regime.

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44. We note that the Ngāti Pikiao Rūnanga attempted to become the heritage protection authority for the Kaituna River during the mid-1990s, but were refused by the Minister. The High Court determined that the Minister should reconsider his decision. The Government considered passing legislation stipulating that heritage orders could not relate to bodies of water, though this legislation was not passed. See *Te Rūnanga o Ngāti Pikiao v Minister for the Environment* unreported (High Court, Wellington, CP 113/96, 15 June 1999), 47 per Gallen J.

45. See Ministry for the Environment, ‘Heritage Orders and Heritage Protection Authorities’, Ministry for the Environment, <http://www.mfe.govt.nz/rma/central/heritage/index.html> (accessed 21 October 2009)

46. Resource Management Act 1991, s 85(2)

47. Allen, p 33

48. Robert McClean, *National Assessment of District Plan Heritage Provisions*, p 11

49. *Ibid*, pp 11–15

The first significant review was conducted by the Parliamentary Commissioner for the Environment in 1996. The commissioner concluded that:

the system for the management of historic and cultural heritage as a whole lacks integrated strategic planning, is poorly resourced and appears to fall short of the principles of the Treaty of Waitangi. Consequently, permanent losses of all types of historic and cultural heritage are continuing.<sup>50</sup>

The commissioner found that Māori heritage was being managed particularly poorly, and identified a range of issues as contributing to the systemic failure to manage Māori heritage, including:

- ▶ lack of coordination between statutory agencies involved in the management of historic and cultural heritage (the Historic Places Trust, the Department of Conservation, and local authorities), and between them and Māori management organisations;
- ▶ lack of resources for the trust to actively assist Māori to protect their wāhi taonga, for example through the development of planning, assessment and information systems, and support to implement measures to protect taonga;
- ▶ limited decision-making power of the Māori Heritage Council;
- ▶ inadequacy of the Historic Places Act in dealing with Māori values associated with archaeological sites; and
- ▶ the potential gap between the archaeological site provisions of the Historic Places Act and the Resource Management Act where local authorities fail to provide for the protection of sites in their policies and plans<sup>51</sup>

The commissioner proposed that the Crown undertake a wide range of legislative and policy reforms, including:

- ▶ establishing a new portfolio for historic and cultural heritage;
- ▶ developing a detailed national strategy for historic and cultural heritage management;
- ▶ amending the Resource Management Act to make protection of heritage a matter of national importance;
- ▶ strengthening and upgrading registration procedures;
- ▶ increasing heritage funding, and establishing various specific targeted funds, including a fund to purchase significant places, and national and local incentive funds for protection and management; and
- ▶ considering integrating the archaeological site authority provisions of the Historic Places Act into the Resource Management Act.<sup>52</sup>

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50. Parliamentary Commissioner for the Environment, *Historic and Cultural Heritage Management in New Zealand*, p 91

51. *Ibid*, pp 67–68, 91

52. *Ibid*, pp 98–99

To improve the management of Māori heritage, the commissioner recommended that the Māori Heritage Council begin by holding hui to ‘develop options for addressing systemic problems in managing Maori historic and cultural heritage.’<sup>53</sup> The resulting hui, convened by the Māori Heritage Council, proposed the establishment of a standalone Māori heritage body, and the council soon after reported to the Government an urgent need for a national heritage strategy confirming the mana of iwi and hapū as kaitiaki for Māori heritage and other taonga, and stressing the need for the participation and empowerment of Māori in managing their heritage through the development of iwi and hapū management plans, databases of sites, and codes of practice and protocols with councils and other agencies.<sup>54</sup>

The commissioner’s criticisms also prompted a ministerial advisory committee review, which consulted widely before issuing a report in 1998.<sup>55</sup> Its recommendations echoed those of the commissioner and, with respect to Māori, largely reflected the views of the Māori communities consulted.<sup>56</sup> Among other things the committee advocated shifting all regulation of heritage into the Resource Management Act and strengthening its provisions relating to heritage. The committee also stressed the need for Government to provide clear national policy direction and greater funds and incentives for heritage protection.<sup>57</sup> With particular respect to Māori, the committee advocated establishing a distinct Māori heritage agency, and giving iwi management plans greater weight in law.<sup>58</sup>

Also that year, Harry Allen, an archaeologist and long-serving board member of the trust, conducted an independent review of the statutory management regime. Noting that the Māori Heritage Council was underfinanced, Dr Allen argued this was a ‘self defeating strategy on the part of the Crown’, and reiterated the necessity for a standalone Māori heritage agency.<sup>59</sup> Dr Allen pointed out that John Klaricich, the chairman of the Māori Heritage Council, had gone so far as to publicly query the effectiveness of available mechanisms for the conservation of Māori places, in particular the registration of wāhi tapu (the primary task of the Māori Heritage Council).<sup>60</sup>

Dr Allen stated that, while consultation had been improved under the current regime as implemented by territorial authorities, who now took Māori concerns into account, ‘the

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53. Parliamentary Commissioner for the Environment, *Historic and Cultural Heritage Management in New Zealand*, p 95

54. Parliamentary Commissioner for the Environment, *Kaitiakitanga and Local Government: Tangata Whenua Participation in Environmental Management* (Wellington: Parliamentary Commissioner for the Environment, 1998), p 6

55. Department of Conservation, *Historic Heritage Management Review: Report of the Ministerial Advisory Committee* (Wellington: Department of Conservation, 1998), pp 15–17, 23–24

56. Department of Conservation, *Historic Heritage Management Review: Summary of Analysis of Public Submissions* (Wellington: Department of Conservation, 1998), pp 16–18

57. Department of Conservation, *Historic Heritage Management Review: Report of the Ministerial Advisory Committee*, pp 12–15

58. *Ibid*, pp 29–30

59. Allen, pp 52–54

60. *Ibid*, p 21

processes of resource management still follow monocultural models. Ultimately, the power of decision making still rests entirely in Pakeha hands.’<sup>61</sup> He argued, however, that this was inadequate since, ‘Maori have a right to participate fully in decision-making regarding all Maori historic places, archaeological sites and wahi tapu whether they are on privately-owned lands or not.’<sup>62</sup> Further, he argued, ‘[u]ltimate decision-making power should reside with the Maori authorities within whose territory such places are located and involve the resources and assistance of the national agencies and territorial authorities.’<sup>63</sup> Dr Allen immediately pointed out that the Resource Management Act already provided for this, through the possibility to transfer management and regulatory powers to iwi.<sup>64</sup>

In large part in response to these highly critical reviews, the Crown has subsequently amended both the Historic Places Act and Resource Management Act in a number of ways to improve management of historic and cultural heritage. Many of these amendments have strengthened the statutory provisions for management of Māori heritage.

The Historic Places Act, for example, did not originally contain any reference to the principles of the Treaty. Indeed, Parliament voted down an amendment which would have inserted a reference to the Treaty into the Act. However, in 1995, the Court of Appeal ruled that the Department of Conservation (which initially administered the Act) was required to give effect to the principles of the Treaty when administering any act under its jurisdiction.<sup>65</sup> Subsequently, when in 2000 the Crown established the Ministry of Culture and Heritage to administer the Act, an amendment was passed explicitly requiring that the Act ‘be interpreted and administered to give effect to the principles of the Treaty of Waitangi, unless the context otherwise requires.’<sup>66</sup> In addition, in 2004, the Historic Places Trust became an autonomous Crown entity within the Ministry of Culture and Heritage. The trust’s governance was amended and now comprises a nine-member board. Four members of the Māori Heritage Council sit on the board. In addition, three of six ministerial appointees to the board are required to have knowledge of te ao Māori and tikanga Māori.<sup>67</sup> Since 2004, the trust has also administered a new national incentive fund, aimed at encouraging the conservation of nationally significant heritage, including wāhi tapu, on private land. The fund has a \$500,000 annual allocation.<sup>68</sup> That year also, the Act was amended so that the trust must notify owners or occupiers of land affected by a proposal to register historic places

61. Ibid, p 19

62. Ibid, p 18

63. Ibid, p 42

64. Ibid

65. *Ngāi Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA)

66. Archives, Culture, and Heritage Reform Act 2000, sch Acts Amended, Historic Places Act 1993, s 32. The Treaty reference is contained in the amended s 115(2).

67. Document r24, pp 3–4

68. New Zealand Historic Places Trust, ‘National Heritage Preservation Incentive Fund’, New Zealand Historic Places Trust, <http://www.historic.org.nz/en/ProtectingOurHeritage/FundingProtection/NHPIF.aspx> (accessed 25 March 2009); New Zealand Historic Places Trust, *Annual Report Purongo a Tau for the Year Ending 30 June 2009* (Wellington: New Zealand Historic Places Trust, 2009), pp 38–40

and wāhi tapu; they may make submissions on such proposals, as may the relevant territorial authority and iwi.<sup>69</sup>

Part 2 of the Resource Management Act has been amended, in 2003 and 2004 respectively, to require decision makers to have added requirements to recognise and provide for ‘the protection of historic heritage from inappropriate subdivision, use, and development’ and ‘the protection of recognised customary activities’ as matters of national importance.<sup>70</sup> Provisions for Māori participation in the main body of the Act have also been strengthened. As discussed in the previous chapter, since 2003 local authorities must now ‘take into account’ iwi management plans, a stronger provision than the previous requirement to ‘have regard’ to them, while since 2005 Māori have been able to share local authorities’ functions, powers, and duties.<sup>71</sup>

In summary, the Historic Places Act now contains a strong injunction that the principles of the Treaty must be given effect to (albeit with a qualifying clause of unspecified scope), while a number of provisions for the statutory protection of heritage have been added to the Resource Management Act, in particular, and its existing provisions for Māori participation have been strengthened.

However, a number of the key recommendations of the reviews that we have summarised have not been implemented. In particular, despite the unanimity of the reviews on these key points, there is still no standalone Māori heritage agency, and there is still no national policy statement for heritage management. Other areas where significant issues remain almost entirely unaddressed include: the continuing ambiguity about the role of, and funding for, the trust’s register; the lack of incentive funding at the local authority level; and the lack of funding to assist iwi and hapū to create heritage databases.

### 8.2.2 Taonga tuturu: ‘antiquities’ legislation

The Crown’s efforts to protect ‘antiquities’ began with the Māori Antiquities Act 1901. While this Act and its subsequent amendments recognised Māori taonga tuturu as significant aspects of national heritage, its main aim was to prevent their unregulated export. It was ineffectual. Very few permits for export were ever refused, and illegal exports remained a problem for several decades. This eventually led to the passing of the Historic Articles Act 1962, which began to tighten conditions on the export of taonga. But, like its predecessors, this legislation failed to address the popular practice of fossicking for Māori ‘curios’. Anyone who successfully dug for Māori artefacts owned them, according to the common law of trover (finders keepers).

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69. Historic Places Act 1993, s 28(1)

70. Resource Management Act 1991, s 6(e)–(g)

71. Ibid, ss 36B, 74(2A)(a)

This changed with the passing of the Antiquities Act 1975, which remains the foundation of Crown legislation for the protection of moveable cultural artefacts.<sup>72</sup> Digging for artefacts was now banned, and *prima facie* ownership of any newly found artefacts was vested in the Crown. Anyone finding an artefact had to inform either the nearest public museum or the Ministry responsible for the Act (since 1999, the Ministry for Culture and Heritage), which decided custody of the object. The Act also established that artefacts found after 1 April 1976 could not be bought or sold, and only registered collectors could have custody of them. Artefacts could not be exported without meeting very strict criteria.

While the Act made the Crown the trustee of all artefacts, Māori individuals could claim ownership of their taonga by applying to the Māori Land Court. The Act also allowed Māori custody over newly found taonga, provided they were registered collectors of antiquities.<sup>73</sup>

In 2006, the law was amended and became known as the Protected Objects Act. The amendments aimed to help in the return of illegal exports, and to make establishing Māori ownership of artefacts easier.<sup>74</sup> Previously, Māori very rarely claimed ownership, because of the costs incurred in commencing legal proceedings with the Māori Land Court.<sup>75</sup> Now, the Minister can apply for Māori to gain ownership (providing it is not disputed) or can facilitate a court application where Māori parties dispute ownership.<sup>76</sup> The amended Act also provides for iwi or hapū, as well as individuals, to claim ownership of taonga tuturu.<sup>77</sup>

We turn now to see how the developing legislative regime influenced – or failed to influence – what happened at six sites of particular cultural significance to Tauranga Māori.

### 8.3 CULTURAL HERITAGE IN TAURANGA MOANA: SIX SIGNIFICANT SITES

#### 8.3.1 Bowentown Domain

Bowentown Domain is a 75-hectare reserve at the northern entrance to Tauranga Harbour, overlooking Matakana Island. It is the subject of a claim from Te Whānau a Tauwhao ki Ōtāwhiwhi (Wai 938), who say that the Crown has failed to protect their ancestral landscape and the integrity of the environment. Claimants have particular concerns about the failure to preserve and protect their wāhi tapu, pā sites, urupā, and archaeological sites, and the lack of provision for their tino rangatiratanga and kaitiakitanga in the management

72. 'Laws, Policies and Practices Relating to the Protection of Moveable Cultural Property 1901–1999', pp 2, 4–5 (attachment to doc T14); Waitangi Tribunal, *The Hauraki Report*, vol 3, p 938

73. Brodie John Stubbs and James Andrew Cormack McKenzie, brief of evidence, 6 October 2006 (doc T14), pp 4–7

74. Ibid, pp 8–9

75. Ibid, p 10

76. Ibid

77. Ibid

of the reserve. The claimants seek the return of the reserve, and provision for funding its management.<sup>78</sup>

The area now occupied by the domain has a long history of Māori occupation, confirmed by the many shell-middens found in low-lying and flat sections.<sup>79</sup> It includes several significant pā sites: Te Ho (on the eastern headland, where important Whānau a Tauwhao ancestors are buried), Te Pā o Auturourou (on the north-western boundary between the domain and the adjacent Māori reserve) and the largest, Te Kura a Maia (built by the area's original Ngā Mārama inhabitants, who were displaced by subsequent arrivals).<sup>80</sup>

The Crown acquired the Bowentown area as part of the Te Puna–Katikati purchase in 1865. Soon after, the Crown reserved 68 acres (around 28 hectares) of land at Ōtāwhiwhi, granted in trust to members of Te Whānau a Tauwhao. This Ngāi Te Rangi hapū had earlier moved away from the area, but began to resettle at Ōtāwhiwhi in the late 1870s. In 1922, their ownership of the Ōtāwhiwhi reserve was formally recognised by the Native Land Court.<sup>81</sup>

The Bowentown Domain was created by the Crown in 1897 on land adjacent to the Ōtāwhiwhi reserve. It was administered first by the Crown Lands Department, then the Katikati Roads Board and, from 1922, by the Katikati Domain Board. Both boards were Crown-appointed.<sup>82</sup> During the initial transfer of ownership and control, the Crown did not consult Tauranga Māori in general nor the Ōtāwhiwhi community in particular. It did not require the County Council to consult with Te Whānau a Tauwhao about future plans for the domain, nor was consultation with Māori required by the Act under which the domain was to be administered.<sup>83</sup>

The domain was immediately popular with campers and, in the early twentieth century, both Māori and Pākehā attended regattas there. The domain board leased the area as grazing, and charged a 'firewood, fish and pipi tax' on those who camped there.<sup>84</sup> Contrary to Lands and Survey Department advice, the board actively encouraged holidaymakers to build baches. By 1934 there were thirty baches, a bathing shed, two toilets and two dressing sheds, a recreation hall and a store. The board had informally leased the whole of Bowentown Heads to W Shannon, who let camp sites, grazed stock and ran the store.<sup>85</sup>

In 1952, Tukumarū Roretana of the Ōtāwhiwhi Māori community approached the Ministers of Lands and Māori Affairs, requesting that a 50 acre (20 ha) area of the domain be made available to the hapū for development as the existing reserve was 'now too small

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78. Claim 1.59(a), p 8

79. Richard Kay and Heather Bassett, 'Ōtāwhiwhi Reserve and Bowentown Domain' (commissioned research report, Wellington: Waitangi Tribunal, 1996) (doc A46), p 32

80. Ibid, p 8

81. Ibid, pp 11, 14, 16–17

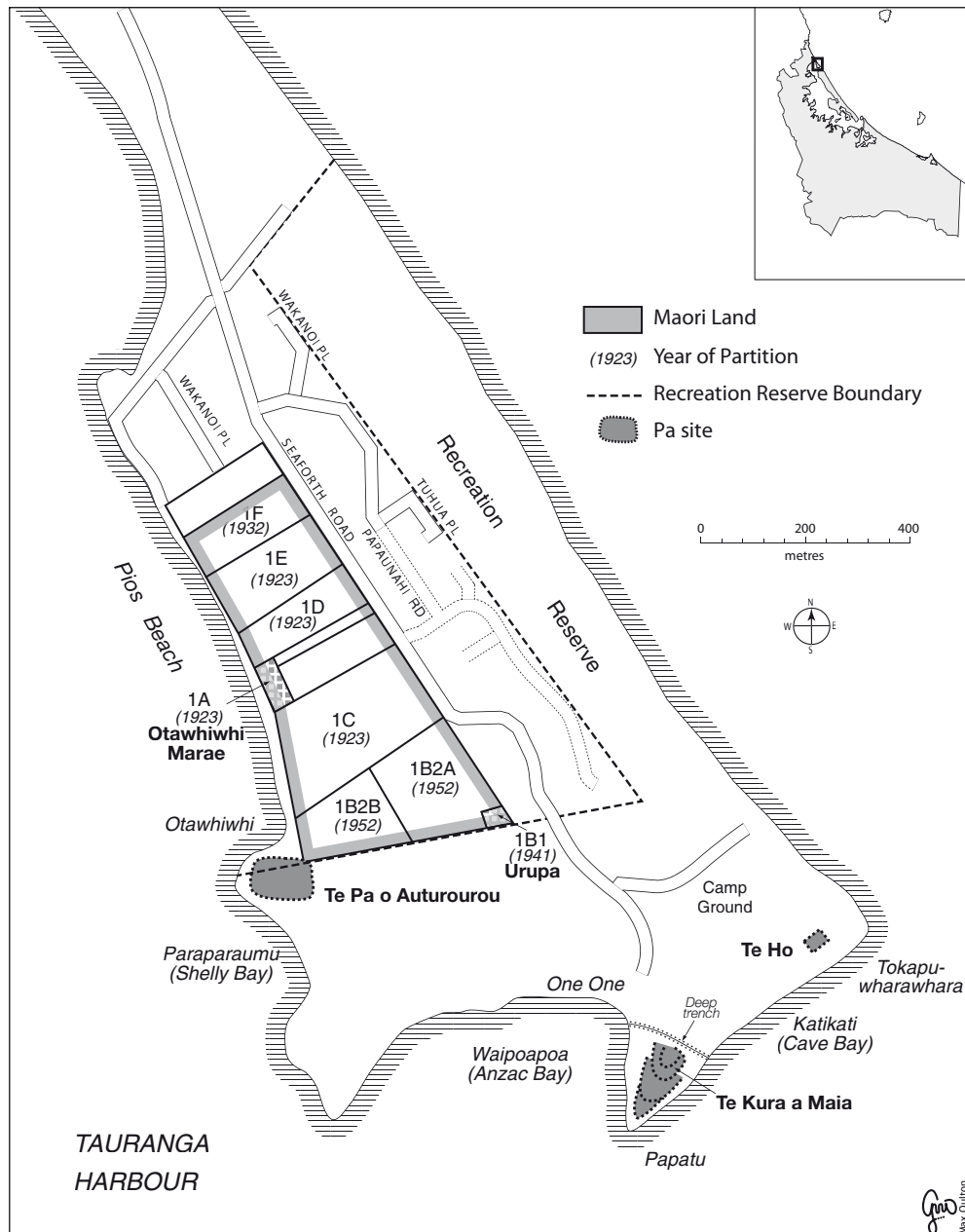
82. Ibid, pp 7, 22–23

83. Ibid, p 30

84. Ibid, p 23

85. Ibid, p 24





Map 8.2: Bowentown domain, pā sites, and Ōtāwhiwhi

and uneconomic to settle.’<sup>86</sup> This request was not granted, but the Minister of Māori Affairs suggested that the hapū might instead purchase the land.

During the same period, the domain board began improving facilities for visitors. The Crown Lands Department were kept informed and actively participated in decision-making

86. Ibid, pp18–19

and, in 1954, advised the board to develop or lease 50 acres (20 ha). There is no suggestion in the evidence that Ōtāwhiwhi Māori were involved in any of these discussions or decisions, nor that their significant sites were taken into consideration, nor that the land available for lease was offered to them.

The domain board established a camping ground supplied with electricity, ablution, and kitchen facilities, and a parking area. It conducted a planting program, made road improvements, and bulldozed tracks. A boating club was given permission to build a clubhouse, wharf, ramps, and parking area on the same side of the peninsula as the Ōtāwhiwhi reserve, with the result that boats used the water directly in front of the marae.<sup>87</sup> Funding came partly from the board's own ventures – grazing, pine planting, and sand extraction – but also from the Tauranga County Council and central government.<sup>88</sup>

Sand extraction was a new venture that the board began in 1962, with the aim of gathering revenue via royalties. Although the Lands and Survey Department had banned sand extraction from this part of the Bay of Plenty because of concerns over foreshore erosion, Bowentown Domain was seen as an exception – the dunes were well grassed and, moreover, the domain was 'overburden' or surplus to requirements.<sup>89</sup> The board's monitoring of the project has been described as 'cavalier'.<sup>90</sup> There were four officially sanctioned licensees, but other contractors also took sand; how much was taken and by whom was never checked. Even the collection of royalty payments was criticised as 'haphazard'.<sup>91</sup>

By the 1970s, foreshore erosion had become a problem. But the board did not end its sand extraction venture until 1978, under mounting pressure from groups such as the Conservation Council.<sup>92</sup> No remedial action to stabilise the dunes appears to have been taken at that time, although, in 1994, a pōhutukawa planting program began. Ōtāwhiwhi Māori also began planting pīngao, intending to harvest it for cultural, financial, and re-seeding purposes, but also to protect the sand dunes from further erosion.<sup>93</sup>

Damage to significant Māori cultural sites also occurred during the domain board's administration. The board saw the sites as potential tourist attractions, and saw no problem with putting roads or firebreaks over pā sites, or adding lawn-mowing ramps.<sup>94</sup> In 1972, archaeologist Janet Davidson advised the Lands and Survey Department that two pā sites had been damaged by the bulldozing of tracks, and that more damage to another 'large impressive and very important pā' was possible.<sup>95</sup> Tribunal researchers Richard Kay and

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87. Richard Kay and Heather Bassett, 'Ōtāwhiwhi Reserve and Bowentown Domain', pp 28–29

88. *Ibid*, pp 27–28

89. *Ibid*, p 35

90. *Ibid*

91. *Ibid*, pp 34–35

92. *Ibid*, p 35

93. *Ibid*, pp 35–36

94. *Ibid*, pp 33–34

95. *Ibid*, p 33

Heather Bassett argue that throughout the board's administration, 'little effort was made to protect the pa and wahi tapu sites'.<sup>96</sup>

In July 1976, the Government transferred control and ownership of Bowentown Domain to the Tauranga County Council, which was by then its major funder. After local government reform in 1989, the Western Bay of Plenty District Council assumed control and continued to manage the domain as a recreational reserve.<sup>97</sup>

In 1982, a submission from the Tauranga Moana District Māori Council to the Tauranga County Council and the harbour board stressed Māori concerns over the fate of the many historic and cultural sites (including many old burial grounds) around the harbour shores, such as at Bowentown. Their submission noted that Tauranga Māori placed a very high value on protecting their wāhi tapu areas, which were increasingly threatened by population growth and urbanisation. They sought to have their values recognised, stating that:

There have been many instances of desecration of such sites, ranging from people in their ignorance picnicking on an old burial ground, to deliberate fossicking for artefacts, and disturbance of old bones . . . Old burial grounds tend to be in two sorts of localities around the harbour shores – inside the earthworks of old pa, or in swampy or sandy areas often at or near high water mark. Not all have been identified here, but such areas should not be included in any form of public recreational use. In cases where an adjacent beach is used for public recreation, there should be clear indications that wahi tapu are not part of the public area, and that penalties for trespass or damage to such a site may be invoked. Maori complaints about such infringements should also be taken seriously by the County Council and Harbour Board.<sup>98</sup>

The Tauranga Moana District Māori Council noted that the Town and Country Planning Act 1977 (s3(1)(g)) did not define the term 'ancestral land'. They argued that local authorities could nonetheless choose to use this provision to accommodate the cultural values of Tauranga Māori in ancestral lands that were no longer owned by Māori. They said that the approach taken by the Auckland Regional Authority in its regional scheme review – which defined ancestral land as 'the land and water regimes occupied and utilised by Maori ancestors and their descendants *regardless of tenure*' (emphasis added)<sup>99</sup> – would also be appropriate in Tauranga.

The Auckland Regional Authority's definition gave authorities the freedom to interpret the Town and Country Planning Act so as to make better provision for Māori values. As we

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96. Ibid, p 6

97. Ibid, p 30

98. 'Maori Cultural Values and Planning for Tauranga Harbour: Submission to Tauranga County Council and Bay of Plenty Harbour Board from Tauranga Moana District Maori Council' (Evelyn Stokes, 'Te Raupatu o Tauranga Moana: Documents Relating to Tribal History, Confiscation and Reallocation of Tauranga Lands', 2 vols (commissioned research report, Wellington: Waitangi Tribunal, 1993) (doc A18), vol 2, p 38)

99. Ibid, p 35

have seen in the previous chapter, however, the local authorities in Tauranga were very slow to come to terms with the Act's provisions regarding ancestral land, and did not accept that they applied regardless of tenure until the Planning Tribunal ruled in 1987 that this was the intent of the law, by which stage the process of resource management law reform that established the current legislative regime was already under way.<sup>100</sup>

The Tauranga Moana Māori Council's 1982 request suggests a history of having their concerns over the treatment of significant cultural sites marginalised.<sup>101</sup> This is borne out in the management of Bowentown domain. Kay and Bassett describe local tangata whenua as 'largely excluded' and 'virtually invisible in the written records of the administration of the domain.'<sup>102</sup> Claimants alleged that the Western Bay of Plenty District Council perpetuates this approach; although consultation had become more frequent, they are still excluded from management.

Recent examples of management that has disregarded Māori values include replacing a toilet block in 1995 on its original site; that is, on a wāhi tapu site, adjacent to three urupā, where it could contaminate kaimoana.<sup>103</sup> This was done despite tangata whenua objections when consulted; their concerns about sewage polluting the harbour were also shared by council staff.<sup>104</sup> Reon Tuanau, chairman of Ōtāwhiwhi Marae, also told the Tribunal that both Te Kura a Maia and Te Ho are covered in gorse, as is Te Kouka urupā where unrestricted access means people can walk through it 'oblivious to its significance'.<sup>105</sup>

Glenn Snelgrove, chairman of the Western Bay of Plenty District Council, acknowledged that, in the past, the reserve was managed and developed in an ad hoc manner. However, he stated that when the 2004 domain management plan was developed, Te Whānau a Tauwhao had been consulted at a hui at Ōtāwhiwhi. There, he felt that '[g]eneral agreement' had been reached on concepts for managing wāhi tapu, and that the council had since consciously avoided transgressing on known wāhi tapu and had directed visitor flow away from these areas.<sup>106</sup> Mr Reon Tuanau acknowledged the council's efforts at consultation, but said that the council 'refuses to engage with us over the management of the reserve'.<sup>107</sup> The ongoing issue is whether Te Whānau a Tauwhao's involvement in the reserve's management will be limited to consultation. We examine this issue further in our discussion and analysis.

100. *Royal Forest and Bird Protection Society (Inc) v WA Habgood Ltd* (1987) 12 NZTPA 76

101. Heather Bassett and Richard Kay, 'Huharua, Pukewhanake, and Nga Kurei a Wharei' (commissioned research report, Wellington: Waitangi Tribunal, 1996) (doc A45), p 20

102. Document A46, p 7

103. Ibid, pp 36–37

104. Ibid, p 37

105. Reon Roger Tuanau, brief of evidence, 26 June 2006 (doc R20), pp 3–4

106. Glenn Snelgrove, brief of evidence on behalf of Western Bay of Plenty District Council, 29 September 2006 (doc T4), pp 14–15

107. Document R20, p 6



Figure 8.1: Kauri Point archaeological dig, Katikati, 1960–61, conducted by the University of Auckland Archaeological Society

Photographer unknown. Reproduced courtesy of Tauranga City Libraries (04–472).

### 8.3.2 Kauri Point Historic Reserve

Located on the shores of Tauranga Harbour near Katikati, Owarau Pā (commonly called Kauri Point Pā) and the adjacent wetland have long been recognised as significant sites of Māori occupation.<sup>108</sup> Along with two other pā, they became part of the Kauri Point Historic Reserve in 1982.<sup>109</sup>

Archaeologist Louise Furey, speaking on behalf of the Hauraki Māori Trust Board, told us about the archaeological importance of both the pā site and artefacts recovered from the swamp.<sup>110</sup> Taonga recovered during site investigations in the 1960s, and now in the custody of the Waikato Museum, include an ‘unparalleled’ collection of wooden items such as combs, figures, utensils, and musical instruments.<sup>111</sup> Dr Furey described this as an internationally

108. This is the name of the pā as given in Warren Gumbley, Dilys Johns and Garry Law, ‘Management of wetland archaeological sites in New Zealand’, *Science for Conservation*, no 246 (2005) (Department of Conservation, Wellington), p 41. Although aware of conflict between claimants over whose traditional site this was, we strictly confine ourselves here to the evidence required to evaluate the Crown’s fulfilment of its responsibility to actively protect the site and the taonga recovered from it.

109. Louise Furey, ‘Waihi Beach–Kauri Point Summary of Archaeology and Review of Taonga’, p 8 (attachment to Louise Furey, brief of evidence, 25 September 2006 (doc s26))

110. Document s26, pp 4–6

111. Furey, pp 4, 10 (attachment to doc s26)



significant collection that shows the development of Māori art. However, because these taonga (like others found in the area and now held in various museums) were found before the Antiquities Act 1975,<sup>112</sup> there is no legal mechanism by which tangata whenua can claim either ownership or custody.

Dr Furey said that good management and protection of publicly owned sites was particularly important given that many archaeological sites in the Katikati–Athenree area were destroyed by intensive horticultural and residential development in the 1970s and 1980s – a period when, Dr Furey told us, the Historic Places Trust lacked sufficient funds and staff to provide adequate protection.<sup>113</sup> The trust was so concerned at the extent of damage that in 1982 it commenced a survey of all archaeological sites on farm lands between Waihi Beach and Tauranga, the largest programme of this kind undertaken by the trust to that date, and which placed considerable stress on the trust's resources.<sup>114</sup> Yet, as Evelyn Stokes has noted, this exercise was 'essentially a rescue operation to record information before it is irretrievably destroyed'<sup>115</sup> The survey was only partly successful in even this limited goal, since it found that hundreds of archaeological sites had already been destroyed.<sup>116</sup>

According to Stokes, at the time of the survey, the trust faced considerable disquiet from local landowners concerned that the protection of archaeological sites would constrain their property rights. The chairman of the Katikati branch of Federated Farmers, for example, argued that compensation should be paid to landowners if the trust decided that archaeological sites warranted protection.<sup>117</sup> As Stokes also notes however, the Tauranga Moana District Māori Council had 'expressed considerable concern about destruction of archaeological sites and disturbance of burials', which were 'sensitive issues in the local Maori community'.<sup>118</sup>

Dr Furey told us that, as land use has stabilised, site destruction has slowed, but continues nonetheless. This means that 'those sites held in public ownership, in reserves, will become more significant relics of the past cultural landscape'.<sup>119</sup>

Claimants' concerns about the Western Bay of Plenty District Council's current management of this especially significant site are confirmed by an archaeological survey conducted for the Department of Conservation in 2000, which concluded that the reserve management plan was inadequate. One problem was the council's decision to lease the site

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112. Furey, pp 4, 10 (attachment to doc s26)

113. Ibid, pp 1–2

114. Ibid, p 1; Evelyn Stokes, *The Impact of Horticultural Expansion in the Tauranga District*, Technical Report 14 (Town and Country Planning Division, Ministry of Works and Development, 1983), p 159

115. Stokes, *The Impact of Horticultural Expansion in the Tauranga District*, p 159

116. Marinus La Rooij, 'Wairoa Hapu and the Realignment of State Highway 2 Wairoa–Tauranga' (commissioned research report, Wellington: Waitangi Tribunal, 1999) (doc F2(b)), p 101

117. *Bay of Plenty Times*, 19 February 1982 (Stokes, *The Impact of Horticultural Expansion in the Tauranga District*, p 160)

118. Stokes, *The Impact of Horticultural Expansion in the Tauranga District*, p 161

119. Furey, p 12 (attachment to doc s26)

for grazing, which led to both the pā and the wetland being damaged by stock.<sup>120</sup> This was supported by Dr Furey, who also observed an absence of signage or fencing alerting the public to the area's cultural heritage values in the area. She noted that the reserve management plan had yet to be referred to the Minister of Conservation for approval, as statutorily required, and concluded that the site was not being managed in accordance with its status as a historic reserve under the Reserves Act 1977.<sup>121</sup>

### 8.3.3 Huharua

In the nineteenth century, Huharua was the name of the small peninsula now known as Plummers Point, which juts out into Tauranga Moana between Ōmokoroa and Te Puna. It was also the name of the largest of three significant pā on this peninsula, where several kāinga were also located.<sup>122</sup> Huharua Peninsula is the subject of claims by Ngāti Hinerangi.<sup>123</sup>

Huharua features prominently in the nineteenth-century history of Pirirākau, Ngāti Hinerangi, and Ngāti Hauā.<sup>124</sup> Pirirākau and Ngāti Hinerangi acknowledge that each has an interest in the area.<sup>125</sup> Traditional accounts suggesting that many are buried at Huharua have been confirmed by the disinterment of kōiwi. The archaeologist Ken Phillips has also identified many other sites in the area – including pā, trenches, and middens – and concludes that this is 'a significant cultural landscape retaining archaeological integrity'.<sup>126</sup>

The fate of Huharua Peninsula has been determined by its being largely in private ownership. Following the Te Puna–Katikati purchase, the Huharua area was surveyed in 1864 as the site for the prospective township of Te Puna (which never eventuated).<sup>127</sup> Māori were allocated three small reserves on the peninsula (lots 210, 211, and 214), totalling 106 acres, but containing only one of the peninsula's three pā sites.<sup>128</sup> All the reserves were sold to European settlers by 1920. Thomas Plummer and his descendants purchased much of the land, and the peninsula came to be known as Plummers Point.<sup>129</sup>

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120. Gumbley, Johns, and Law, 'Management of wetland archaeological sites in New Zealand', pp 45–47

121. Document s26, pp 8–9; transcript 4.4, pp 14–15

122. Document A45, p 6

123. Counsel for Wai 1226 claimants, closing submissions, 5 December 2006 (doc U24), pp 43–46

124. Document A45, pp 9–10

125. We are aware of debate over the distribution of customary rights in the area. However it is not our intention to reopen matters which were properly the subject of the stage 1 inquiry. Our purpose here is strictly confined to ascertaining the significance of the area's cultural heritage, and investigating the Crown's roles in both protecting that heritage, and providing for Māori rangatiratanga. See doc U24, p 41; counsel for Wai 227 claimants, closing submissions, undated (doc U16), p 24.

126. Quoted in doc s44, pp 27–28

127. Document A45, p 9

128. Ibid, pp 17, 20

129. Ibid, pp 12–17



Bassett and Kay argue that ‘The process of creating Pakeha farm settlements on Plummers Point meant that Maori were denied control, management and access to the land. This meant they became powerless to prevent the wahi tapu from being desecrated.’<sup>130</sup>

This lack of control was demonstrated in 1927, when Thomas Plummer applied to close a road where it ran through his property along the shore. This road provided local Māori with access to Huharua Pā, to an urupā, and to a traditional gathering place for kaimoana. Other local people also used it to reach the river and as a deep-water landing.<sup>131</sup> A local Pākehā settler, W McClinchie, and a local Māori leader, Werahiko Borrell, together organised a petition to stop the road closure and sent it to the Minister of Internal Affairs. Werahiko Borrell also sought Sir Maui Pomare’s support, pointing out that ‘[t]here is a Pakeha growing food on this cemetery, and desecrating the remains of our ancestors.’<sup>132</sup> This is consistent with other evidence of the Plummers unearthing both kōiwi and taonga from their property, and sending the best artefacts to the Auckland Museum.<sup>133</sup> The Government disregarded Borrell’s complaints because he had no property interests in the lands concerned. Yet, as Kay and Bassett conclude, ‘Maori association with this land remained strong regardless of who owned it at any one point in time.’<sup>134</sup>

The Huharua area was recently purchased by the Western Bay of Plenty District Council with the Tauranga City Council. They have established a recreational reserve there known as Huharua Harbour Park. Its management plan, prepared in consultation with Pirirākau and Ngāti Hinerangi, stresses the significance of the area to tangata whenua. The plan treats the preservation of the area’s archaeological sites as if it was a historic reserve, and includes many measures designed to protect key cultural sites such as Ongarahu Pā. The plan states that the cultural heritage values of these significant sites within the park will take priority over those associated with recreation.<sup>135</sup>

Māori are inevitably concerned when wāhi tapu sites are located in areas managed for public recreation, but there are different views on how best to respond. Pirirākau have decided the best course is to ‘enter into dialogue and advocacy in order to protect their associations as best they can within the constraints of the relevant legislation.’<sup>136</sup> Ngāti Hinerangi, however, believe this use of Huharua cannot be reconciled with the tapu nature of the site.<sup>137</sup> To minimise desecration, Ngāti Hinerangi want tangata whenua to be partners in any development of Huharua.<sup>138</sup>

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130. Document A45, p 17

131. Ibid, pp 17–18

132. Ibid, p 18

133. Ibid, p 19

134. Ibid, pp 18–19

135. Western Bay of Plenty District Council, *Huharua Harbour Park Management Plan* (Tauranga: Western Bay of Plenty District Council 2006), p 8

136. Document U16, p 23

137. Document U24, p 45

138. Ibid, pp 49–50

**8.3.4 Mangatawa**

Mangatawa is a maunga tupuna of great importance to tangata whenua around the eastern arm of Tauranga Harbour, and is sacred to both Ngāi Te Rangi and Ngāti Ranginui iwi. It is sometimes known as Te Tohorā, the whale; in traditional histories, it was the female of a pod of whales (also including Kopukairoa) which were transformed into hills.<sup>139</sup> Mangatawa is also celebrated for its associations with significant ancestors. Tamatea Pokai Whenua (grandson of Tamatea Ariki Nui, the captain of the Takitimu waka) established a pā on Mangatawa, and his son, Kahungunu, also lived there. Tamapahore, leader of Ngāi Te Rangi in their struggle with Ngāti Ranginui, was buried there. In the early nineteenth century, Ngā Pōtiki established a marae named after Tamapahore at the base of the hill, and still used Mangatawa as a burial site in the early twentieth century.<sup>140</sup> Colin Reeder of Ngā Pōtiki described Mangatawa as ‘the largest and possibly oldest urupā in the Bay of Plenty’.<sup>141</sup>

Despite its significance to Tauranga Māori, two major public works affected Mangatawa in the second half of the twentieth century: a quarry and a reservoir. The Crown’s successive arrangements for enlarging the quarry under the Public Works Act have been discussed in chapter 4. We focus here on how the quarry damaged the cultural heritage of Tauranga Māori.

A small quarry was established at Mangatawa in the late 1940s, but the Ministry of Public Works soon sought to enlarge it as demand for urban infrastructure increased. The Rangataua Historical Society opposed the plan, urging the Minister for Māori Affairs to preserve this ‘fine specimen’ of a pā, complete with kāinga and cultivation terraces.<sup>142</sup> Similarly, the Naumai Club of Mangakino told the Minister for Public Works that, ‘While fully realising that this country’s economic and industrial progress must be maintained, we would regard the prices as too high if made at the expense of the cultural and historical heritage of our Māori people’.

Mangatawa Pā was ‘too intimately connected with the past of our race, to permit us to witness its destruction without voicing our protest.’ They asked the minister to ‘do all in your power to prevent the desecration and destruction of an area that is sacred to us and to the memory of our people’.<sup>143</sup>

The Ministry of Works responded that because ‘the Government has no intention of quarrying outside the boundaries of the land acquired’, the quarry would therefore not affect the ‘old fortifications or terraces of the pa’. The district commissioner of works later reported that, ‘[a]s all further work will be confined to our land’, he had asked a Māori employee and

139. Heather Bassett, ‘Mangatawa’ (commissioned research report, Wellington: Waitangi Tribunal, 1996) (doc A44), p 10

140. Ibid, pp 10–11

141. Colin Reeder, brief of evidence, 26 June 2006 (doc R30), p 23

142. Secretary, Rangataua Historical Society to Minister of Maori Affairs, 27 February 1952 (documents in relation to Mangatawa, undated (doc E34), p 2)

143. Naumai Club to Minister of Public Works, 2 May 1952 (doc E34, p 4)

former owner to locate on it any relics, including burial sites, and ‘point the cause for the complaints’. Some doubt had now emerged about the position of graves, as some bodies had in the past been reburied near Mount Maunganui. Nothing definite was identified except one possible burial site near the boundary, which the commissioner believed the quarry operations would not encroach on.<sup>144</sup>

Tauranga’s rapid development meant that, by 1956, much more rock was needed than previously anticipated. The district commissioner of works recommended extending the quarry by 10 acres (just over four hectares). While admitting that, ‘[w]ere the hill still in its undefiled state I would hesitate to recommend the establishment of a quarry’, he believed that ‘[t]he hillside has already been defaced to such extent as to detract very considerably from its overall value as an historic monument’. Therefore, he saw ‘little point in refusing’ the extension, especially given the economic considerations.<sup>145</sup> In accepting his recommendation,<sup>146</sup> the Ministry showed a remarkable turnaround: having originally justified the quarry on the grounds that it would not harm the historic sites of Mangatawa, it subsequently justified extending it by pointing to the damage that the quarry had already done to those sites.

By 1961, the *Bay of Plenty Times* reported that nearly one side of the hill had already been removed by quarrying.<sup>147</sup> The quarry was again enlarged (by nine acres, or 3.6 hectares) in 1963, and a 33-year lease was agreed. The quarry remained in heavy use until the 1980s when there was a temporary hiatus in activity.<sup>148</sup>

It was then that the Mangatawa–Pāpāmoa Incorporation sought to protect the site from any further works. It successfully applied to the Historic Places Trust to have the maunga designated as both a traditional and an archaeological site. This designation recognised its ‘special significance’ to the western Bay of Plenty Māori, and to Ngā Pōtiki in particular.<sup>149</sup>

The trust then convened a meeting between the Ministry of Works, local councils and representatives of the incorporation. The trust explained that ‘rather than attempt to apply draconian statutory powers, or . . . work through local authority district scheme arrangements’, it wanted the parties to reach consensus on how best to protect the site’s cultural heritage. While Māori were adamant that there should be no more quarrying, the Ministry and the Mount Maunganui Borough Council each insisted that their plans – to reopen the quarry and build a water reservoir on nearby land – could not be changed without unjustifiable

144. Acting resident engineer to district commissioner of works, 30 May 1952 (doc E34, p 3); Minister of Works to Naumai Club, 29 June 1952 (doc E34, p 5); resident engineer to district commissioner of works, 19 September 1952 (doc E34, p 6)

145. District commissioner of works to commissioner of works, 17 May 1957 (doc E34, p 9)

146. Commissioner of works to Minister of Works, 7 August 1957 (doc E34, p 11)

147. *Bay of Plenty Times*, 12 August 1961 (Bassett, doc A44, p 16)

148. Document A44, p 17

149. Advisory officer Historic Places Trust to proprietors of the Mangatawa–Pāpāmoa Block Incorporation, 13 September 1984 (doc A44, p 37)



Figure 8.2: Mangatawa, circa 1950s, showing the terraces of the pā, and the quarry

Photograph by Whites Aviation. Reproduced courtesy of the Alexander Turnbull Library (WA-36460).

costs.<sup>150</sup> Bruce McFadgen, the trust's archaeologist, determined that the proposed quarrying would affect archaeological sites. The local member for Eastern Māori, Peter Tapsell, also became involved, telling the Ministry and the borough council that their proposals would each create an 'eyesore on the skyline'.<sup>151</sup>

This impasse seems to have been broken at a further meeting convened by the trust, where the Ministry presented a management plan for the Mangatawa–Pāpāmoa Incorporation's approval. The evidence is not conclusive, but this appears to have been given, although (for reasons unknown) the plan itself was not implemented when the quarry reopened in 1986.<sup>152</sup> The Ministry acknowledged to Tapsell at the time, however, that the quarry and land must eventually be handed back to the owners in 'an appropriate state, from both an engineering and visual point of view'.<sup>153</sup>

Throughout the 1990s, negotiations continued between the incorporation and the Ministry about the payment of royalties, the management of the quarry, and the possibility

150. Document A44, p 38

151. Ibid, pp 38–40

152. Ibid, p 40

153. Ibid

of an ‘orderly and environmentally accepted closure of the quarry’.<sup>154</sup> In 1994, the incorporation agreed to the Ministry’s proposal to restore the maunga by filling in the site, removing debris and landscaping the surrounding area. Although the quarry leases expired in 1996, not all these conditions have been met. Tauranga City Council states that the area is now almost completely grassed over and the council has planted trees in the area.<sup>155</sup> Yet, in 2006, tangata whenua witnesses told the Tribunal that they considered the quarry remained in a dangerous state.<sup>156</sup> Bassett concluded after inspection that it does not appear the quarry has been restored to a grassy slope as envisaged in the restoration proposal.<sup>157</sup>

The quarry had ongoing repercussions for Tamapahore Marae and people living nearby over several decades. Huriana McLeod Taite, of Ngāti Kāhu, spoke of the pervasive dust, costly damage to the marae foundations from blasting, and danger from flying rocks: ‘my brother Kaupapa got hit and had to go to hospital. Every day the house would get hit by stones.’ More recently, the Tribunal heard, a build-up of mud and rock at the bottom of the quarry overflowed during heavy rain, flooding houses and damaging the landscape.<sup>158</sup>

Former employees of the quarry have given evidence about the impact of finding kōiwi uncovered by the works. Andrew Kiwi, of Ngā Pōtiki, stated that:

Even though the quarry had been going for some years before I started working there, we were still finding bones that were blasted from the hills. When the Bully driver would push the rock down the hill, we would find the bones and all of us would pick them up – all of us workers. Tareha told us to take the bones to his batch and put them in the box there, and I believe he would then take them to Karikari to rebury them. At the time I was young and didn’t realise what it all meant, but today it is a sad feeling, it is sad to know that we were digging bones out of the rock now that we are older and realise what it is all about.<sup>159</sup>

Keremeta Rameka, of Ngā Pōtiki, described his discovery of the ‘perfect skeleton of a small child’, following which ‘[a] cloud of deep sadness hung over me’.<sup>160</sup> Similarly, Sydney Rameka, of Ngā Pōtiki, recalled:

Sadness was around us every time we saw new lots of bones pop up, especially when I saw two complete skeletons in a squatting position in the long grass, when my mates went to pick them up some of it crumbled. These bones I knew belonged to our tupuna . . .<sup>161</sup>

154. Tapsell, member of Parliament for Eastern Māori to Minister of State-owned Enterprises, 24 September 1991 (doc A44, p 43)

155. Jamie Mitchell, ‘Report on unresolved land and resource issues for the Tauranga District Inquiry’ (commissioned research report, Wellington: Waitangi Tribunal, 2006) (doc S3), p 5

156. Transcript 4.9, pp 8–9, 11

157. Document A44, p 44

158. Huriana McLeod Taite, brief of evidence, 22 June 2006 (doc R18), pp 5–6; Kiwi Molly McLeod, brief of evidence, 22 June 2006 (doc R59), p 5

159. Andrew Uata Kiwi, brief of evidence, undated (doc E17), p 4

160. Keremeta Kiwi Rameka, brief of evidence, undated (doc E28), p 4

161. Sydney Kiritawhiti Hohepa Rameka, brief of evidence, undated (doc E16), p 2



Witnesses also noted the discovery of taonga during quarry blasting.<sup>162</sup> Poihaere Walker's lament encapsulated the depth of the grief felt by tangata whenua:

I look at my Maunga, Mangatawa, who has been defaced and I cry. I look at her destruction and I cry. I think of my Tupuna who fought so I could have a future and I cry. I think of the many hundreds of boxes containing the remains of my Tupuna that were blasted from their resting places and I cry. I think of the remains of my Tupuna who weren't fortunate enough to be put in a box . . . and wonder which road or causeway they could be lying under and I cry. I feel I have let my Tupuna down for allowing this to happen and I cry.<sup>163</sup>

In sum, because Mangatawa provided a convenient local source of hard volcanic stone, it was quarried extensively to support Tauranga's rapid expansion. Over about 50 years, millions of cubic metres of rock were excavated for most of the region's major infrastructure projects.<sup>164</sup> But in the process, considerable damage was caused. The outline of the hill was substantially altered, and most of the heavily terraced northern point – 'the eye of the whale' – was removed.<sup>165</sup> The destruction of their maunga tupuna has caused considerable distress to the tangata whenua of the area, as has the discovery, destruction or reburial of many kōiwi under roads and causeways.

Long-standing opposition from Māori to the quarry has ensured the land remains in Māori ownership, but has not prevented any planned excavation. Notably, the designation of Mangatawa as a traditional and historical site under the Historic Places Act 1980 has offered it very little protection. The essence of the claimants' concern is captured in the question posed to us by Colin Reeder: '[w]ould the Crown have destroyed the Tauranga Public cemetery and treated the remains of non-Maori in the same way?'<sup>166</sup>

### 8.3.5 Kopukairoa

Standing 265 metres high, pine-clad Kopukairoa<sup>167</sup> is both a dominant landmark in Tauranga Moana and a key marker of cultural identity. In the oral traditions of tangata whenua,<sup>168</sup> Kopukairoa is celebrated as a petrified male whale that was part of a pod comprising his mate, Mangatawa, and his child, Hikurangi, which became hills after drinking

162. Document E17, p 4; doc E28, p 4

163. Poihaere Walker, brief of evidence, undated (doc E20), p 10

164. Document A44, pp 7–8

165. Ibid, p 5

166. Document R30, p 23

167. Throughout this chapter, we have spelled the name of the maunga as 'Kopukairoa', following the spelling in several briefs of evidence, including that of Rahera Ohia (doc Q20). We note, however, that not all claimants accepted this spelling: Colin Reeder, for example, notes that the name 'Kopukairua' was reiterated by Ngā Pōtiki elders at a meeting of Tahuwhakatiki Marae Trustees in 18 June 2006 and, furthermore, agrees with information recorded by Land Information New Zealand Toitū Te Whenua, as well as nearby Kairua Road (doc R30, p 13).

168. Te Awanuiarangi Black, brief of evidence, 28 June 2006 (doc R45), p 15; doc R30, pp 14–15; Anita Miles, *Kopukairoa: Tauranga Telecom Site*, Waitangi Tribunal Research Series, 1993, no 4, p 2



from an enchanted spring.<sup>169</sup> Although no significant archaeological sites are recorded on the mountain, kōiwi have been found concealed there.<sup>170</sup> Kopukairoa is the only one of the three sacred maunga that has not been quarried.

Although it was Ngāti Pūkenga that first lodged a claim in relation to Kopukairoa (Wai 162), they acknowledge that others have customary interests in the maunga, especially Ngā Pōtiki.<sup>171</sup> As their maunga tupuna, Ngāti Pūkenga say that Kopukairoa embodies the mana whenua of the local iwi.<sup>172</sup> They assert the Crown has permitted damage and desecration to the wāhi tapu and taonga of the maunga, including its mauri. At this stage, the claimants do not seek Tribunal recommendations for the return of any land, but rather an acknowledgement that their claim is well-founded, and that relief is due to them.<sup>173</sup> Much of the mountain remains Māori freehold land although, since 1990, Telecom has owned the summit and has placed telecommunications towers there. Other parts of the mountain are general land in private ownership, and it is activity on this private land between 1997 and 2001 that most concerns the claimants today. During that period, two roads were cut and a house built. One road lacked resource consent, resulting in Ngā Pōtiki taking a case to the Environment Court. According to the chief executive, Glenn Snelgrove, the Western Bay of Plenty District Council allowed these activities because they were unaware of the importance of the mountain for Ngā Pōtiki, who did not indicate that this was a significant site when consulted over the council's district plan in 1994.<sup>174</sup> However, the claimants say that they had discussed with the council the importance of Kopukairoa well before the first (illegal) road was cut in 1997, and had signalled their intention to have it registered as a significant site in the heritage schedule of the district plan.<sup>175</sup> Mr Snelgrove did not address this contention before us.

Ngā Pōtiki and Ngāti Pūkenga have repeatedly sought to have the significance of the maunga recognised by local authorities and the Crown. Apart from the claim to the Waitangi Tribunal (Wai 162), registered in 1990, Kopukairoa was also listed as a significant site in a Ngāti Pūkenga iwi management plan of 1991 and the Ngāi Te Rangi iwi management plan of 1995.<sup>176</sup>

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169. Document R45, p 15

170. Rereamomo Monty Ohia, brief of evidence, 22 May 2006 (doc Q22), p 4; doc R30, pp 14–15

171. Claim 1.4(b), p 2. We have already discussed in chapter 4 claims regarding the failure of the Crown to maintain hapū control over Kopukairoa, and the subsequent alienation of much of the returned land. Here we discuss cultural heritage aspects of the claim.

172. Document U34, p 57; claim 1.4(b), p 4

173. Claim 1.4(b), pp 11–12

174. Document T4, p 17

175. Rehua Smallman, brief of evidence, 26 June 2006 (doc R43), pp 3–4; Ngā Pōtiki Resource Management Unit to Maori Issues Forum, Western Bay of Plenty District Council, May 18 2001, pp 2–3 (doc T18(a))

176. Desmond Tatana Kahotea, 'A Study of Heritage in Tauranga Moana Since 1991' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2006) (doc T18), p 33; transcript 4.7, pp 117–118

In 2001, Ngā Pōtiki applied to the Historic Places Trust to have Kopukairoa registered as a wāhi tapu area. This was accepted, on the recommendation of the Māori Heritage Council, despite the objections of the property owners.<sup>177</sup> Desmond Kahotea suggests that Ngā Pōtiki's move was purely a last resort, made because of the lack of protection provided by the district plan.<sup>178</sup> Tauranga Moana Māori have registered only four of their wāhi tapu or wāhi tapu areas with the trust. In Kahotea's opinion, this 'speaks volumes'.<sup>179</sup>

The registration of Kopukairoa as a wāhi tapu area generated considerable controversy and was debated at public meetings, in national media, and by Parliament. Colin Reeder told us that Kopukairoa became the 'symbol of a clash of world views'.<sup>180</sup> Opposition to the wāhi tapu area registration focused on the perceived threat posed to the rights of private property owners by the 'draconian' powers of the trust, the size of the wāhi tapu area, and disbelief that the place was sacred to Ngā Pōtiki. The trust felt forced to issue a succession of press releases and letters clarifying that registration confers no statutory protections on wāhi tapu, save those that territorial authorities elect to adopt by making provisions in their plans.<sup>181</sup> Dame Anne Salmond, chairwoman of the trust's board of trustees, lamented the 'ugly' public debate over Kopukairoa's registration, in which Māori values were widely ridiculed. She remarked:

'Wahi tapu' are, literally, 'sacred places'. Churches, chapels, graveyards and cenotaphs are also sacred places, but these are widely respected. No sane person in public life in New Zealand would seek to court popularity by mocking those places, or the beliefs they represent. Why, then, have wahi tapu been treated with such derision?<sup>182</sup>

The trust's consistent message was that its powers, far from being draconian, were in fact quite inadequate to properly protect cultural heritage. As the chief executive, Bill Tramosch, said, 'the most a council need do is to "have particular regard" to any Trust recommendation – hardly a strong or binding requirement'.<sup>183</sup> He stressed that the trust lacked the powers to 'ensure full protection of all types of heritage places'. 'The power to protect or not protect heritage lies with the territorial authorities'.<sup>184</sup>

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177. Document T18, pp 34–35

178. Ibid, pp 3–4

179. Ibid, p 65. Kahotea initially gave the figure of three wāhi tapu areas. However, Richard McGovern-Wilson listed four wāhi tapu areas in the inquiry district (see doc T24, p 26).

180. Document R30, p 14

181. New Zealand Historic Places Trust, 'Kopukairoa response: Lets get the facts right: Questions and Answers about Registration', New Zealand Historic Places Trust, [http://www.historic.org.nz/news/MEDIA\\_RELEASES/2002\\_11\\_27.html](http://www.historic.org.nz/news/MEDIA_RELEASES/2002_11_27.html) (accessed 6 April 2009)

182. Anne Salmond, letter to the editor, *Dominion Post*, 3 December 2002

183. Bill Tramosch, chief executive Historic Places Trust, letter to the editor, *New Zealand Herald*, 29 November 2002

184. New Zealand Historic Places Trust press release, 'Wahi Tapu Registration – The Facts', 20 November 2002

Indeed, despite its wāhi tapu registration by the trust, Kopukairoa is still not listed as a significant heritage feature in the Western Bay of Plenty district plan.<sup>185</sup> The current plan does not allow sites to be listed without the approval of affected landowners, and ‘qualified factual information as to the significance of the item.’<sup>186</sup> Yet, at its own discretion, the council has rejected a recent request that Kopukairoa be listed as a significant *landscape* feature because it is ‘an integral part of the ancestral and visual landscape.’<sup>187</sup> Tangata whenua therefore have no power to determine their relationships with their ancestral landscapes, except where landowners happen to accept their views. In this instance, despite exhausting all of the statutory avenues available to them, the values that Kopukairoa holds for tangata whenua still lack any statutory protection.

### 8.3.6 Development at Pāpāmoa

The coastal dune plain of Pāpāmoa has long been earmarked by the Tauranga City Council to help deal with Tauranga’s expected population increase. Large areas of Pāpāmoa were zoned residential in the 1993 transitional district plan. Ongoing plan changes aim to further enlarge the residential zone to accommodate at least another 20,000 people. Large-scale subdivision and development have proceeded very rapidly,<sup>188</sup> involving substantial earth-moving.<sup>189</sup> The speed and scale of this ongoing development has already destroyed much of the cultural landscape, and continues to place many sites of significance to Tauranga Māori, and to Ngā Pōtiki and Waitaha in particular, under threat.<sup>190</sup>

For claimants, what has happened at Pāpāmoa highlights several things: the negative impact of rapid development on their cultural heritage, the inadequacies of the legislative framework, and the fundamental problem Māori face in trying to protect values associated with land that they no longer own. In particular, they allude to Poplar Lane quarry and Pāpāmoa Junction as examples of the deficiencies of the legislative regime.<sup>191</sup>

185. Nor is it included in the proposed district plan. Western Bay of Plenty District Council, ‘Western Bay of Plenty District Plan: Appendix 3: Schedule of Identified Significant Historic Heritage Features’, Western Bay of Plenty District Council, <http://www.westernbay.govt.nz/Documents/Projects/Proposed%20District%20Plan/Plan%20Sections%20Decisions%202010/Appendix%203%20-%20Schedule%20of%20Identified%20Significant%20Historic%20Heritage%20Features.pdf> (accessed 16 September 2009)

186. Western Bay of Plenty district plan (2002), s 11.1, p 1; we note however that the notified review of the district plan omits this requirement: Western Bay of Plenty District Council, ‘Western Bay of Plenty District Plan: Section 11 – Heritage’, Western Bay of Plenty District Council, [http://www.westernbay.govt.nz/Documents/Publications/DistrictPlan/Section%2011\\_Heritage.pdf](http://www.westernbay.govt.nz/Documents/Publications/DistrictPlan/Section%2011_Heritage.pdf) (accessed 21 July 2009).

187. Western Bay of Plenty District Council, ‘Section 32 Report for the Landscape Section of the District Plan’, Western Bay of Plenty District Council, <http://www.westernbay.govt.nz/Documents/Projects/Proposed%20District%20Plan/Section%2032/S32%20Landscape.pdf> (accessed 15 May 2009)

188. Desmond Tatana Kahotea, brief of evidence, undated (doc E18), p 10

189. Warren Gumbley, ‘Papamoa: A General Summary of the Situation as it Affects Archaeological Sites’, Report on Papamoa Archaeological Sites – Gumbley NZHPT, 13 July 1995, p 1 (doc T18(a))

190. Document T24, pp 19–20

191. Document U5(a), pp 36–37

The traditional history of Pāpāmoa extends back to the arrival of ancestral waka such as Takitimu, Te Arawa, and Mātaatua. The area had several attractions for Māori. The dune plain behind the coast was intersected by a complex wetland sequence that provided a wide variety of resources, as well as easy access to the coast. The forested hills rising behind the plain provided another range of resources, and were easily defensible.<sup>192</sup> Control over the area was therefore contested, and it was the site of several battles. There are, accordingly, several wāhi tapu in the area – discrete urupā and scattered tūpāpaku (bodies) have been found through the length of the coastal dunes.<sup>193</sup> Clearly, the dune plain was a place of significant occupation and use.<sup>194</sup>

Archaeologists, however, knew very little about the plain, and had recorded few sites there. It was in fact assumed that Māori occupation at Pāpāmoa was focused on the hills rising inland from the coastal dune plain, where many pā sites are still evident – including some of the largest and oldest in New Zealand.<sup>195</sup> The result of this assumption was that cultural heritage values associated with the lowland dune plains were initially considered as insignificant; a great deal of damage was done to the cultural landscape before archaeologists uncovered the extent of their error.

During the early 1990s, in the first phases of development, very little protection was provided to the lowland landscape. Tauranga City Council granted resource consents involving large-scale earthworks, with little concern for any impact on cultural values and without always waiting for the Historic Places Trust to process applications to destroy archaeological sites.<sup>196</sup> The trust routinely granted permission to destroy sites at Pāpāmoa during this time, on the basis of very poor archaeological practices. Consultant archaeologists simply monitored earthworks as dunes were recontoured; that is, they followed the bulldozers.<sup>197</sup> In fact, the development of several of the first large subdivisions at Pāpāmoa was overseen by people with no formal training or qualifications in archaeology whatsoever.<sup>198</sup>

Even these cursory methods uncovered and recorded so much archaeological material that, by the mid-1990s, there was significant concern at the loss of archaeological sites. Warren Gumbley, archaeological sites officer for the trust, knew enough to conclude in 1995

192. Clayton Fredrickson, Desmond Tatana Kahotea, Matthew Felgate, 'An Archaeological Survey of the Papamoa Coastal Zone, Tauranga District', report prepared for the Tauranga District Council, May 1996, pp 1–2; Warren Gumbley and Ken Phillips, 'Papamoa Lowlands Archaeological Survey and Heritage Assessment', report prepared for Tauranga City Council, 2000 (doc T27), p 13

193. Document E18, pp 3–5, 19–21

194. Warren Gumbley, 'Papamoa: A General Summary of the Situation as it Affects Archaeological Sites', 13 July 1995, pp 2–3 (doc T18(a)); doc E18, pp 4–5; doc T24, pp 8–9; Thomas Abraham McCausland, brief of evidence to Environment Court, pp 5–8 (attachment to doc S33)

195. Document T27, p 4

196. Desmond Tatana Kahotea to Craig Batchelar, manager of planning and environment, Tauranga District Council, 7 June 1995 (doc T18(a)); Desmond Tatana Kahotea to Craig Batchelar, manager of planning and environment, Tauranga District Council, 21 August 1995 (doc T18(a))

197. Document T27, p 45; doc T24, p 21

198. Document E18, p 17; Desmond Tatana Kahotea to Craig Batchelar, manager of planning and environment, Tauranga District Council, 21 August 1995 (doc T18(a))

that ‘the Papamoa area must be regarded and treated by the Trust as an historic and cultural landscape of some importance locally and regionally.’<sup>199</sup> He stressed that research was urgently required to develop an understanding of the cultural heritage landscape – something that was not possible when the Historic Places Act provided only for ‘rescue’ archaeology in response to applications to destroy sites.<sup>200</sup> In addition, Gumbley warned that more effective integration of the statutory processes of the Resource Management Act and the Historic Places Act was required, and greater understanding and cooperation from the (then) Tauranga District Council.<sup>201</sup>

The Tauranga District Council commissioned Gumbley and Ken Phillips to conduct a cultural heritage study of the Pāpāmoa lowlands area. Meanwhile, development continued unabated. In 1998, Gumbley told the Tauranga District Council that:

the cultural/archaeological landscape is extensive and intensive . . . It is sad that at least half of this landscape has been destroyed without even achieving more than a shallow understanding of it. It is even more regrettable that this has happened without any serious attempt to preserve any of it.<sup>202</sup>

Gumbley and Phillips’ 2000 report noted that the most affected area was a band of archaeological sites set a few hundred metres back from the coast; just 15 per cent of its original 1000-odd hectares remained unaffected by residential development, and that only in fragmented form.<sup>203</sup> They criticised previous archaeological work as providing only a superficial and possibly seriously flawed understanding.<sup>204</sup> Given the already significant losses, they stressed the particular importance of preserving an intact archaeological complex surrounding a cluster of relatively well preserved ‘swamp pa’ in the Te Houhou ki Wairākei area, part of the Pāpāmoa 1 block awarded to the Crown when it asked for its interests to be cut out in 1893 (as discussed in section 2.3.5). They strongly recommended that the Tauranga District Council take immediate action to preserve this area as a historic reserve.<sup>205</sup>

The council did not implement Gumbley and Phillips’ recommendation. Giving evidence for the council, Andrew Ralph said that much of the land concerned had already been zoned residential, and the council had not been prepared to change this proposed land use. The council has been generally unwilling to reserve any land at Pāpāmoa to protect cultural heritage; reserves have been created in only one instance, at the insistence of the developer and against the objections of the council.<sup>206</sup> Instead, the swamp pā complex was added to

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199. Warren Gumbley, ‘Papamoa: A General Summary of the Situation as it Affects Archaeological Sites’, 13 July 1995, p 3 (doc T18(a))

200. Ibid

201. Ibid

202. Document E18, p 23

203. Document T27, p 4

204. Ibid, p 45; doc T24, p 21

205. Document T27, pp 7, 46–47

206. Warren Gumbley to Desmond Tatana Kahotea, 5 December 1995 (doc T18(a))

the district plan's list of significant sites.<sup>207</sup> (In addition, the property that contains the core of the complex, including two of the swamp pā, was land-banked by the Office of Treaty Settlements.)<sup>208</sup> At the same time, the Ngā Pōtiki resource management unit applied to the Historic Places Trust for the most significant part of the Te Houhou ki Wairākei area to be registered as a wāhi tapu area.<sup>209</sup> The application was granted in September 2004.

However, in 2003, Pāpāmoa Junction Limited had purchased land at the western end of the proposed reserve, intending to develop and subdivide. They applied for the trust's permission to destroy the archaeological sites on a terrace that extended into their property. The trust refused, on the grounds that these sites were significant because of their connection to the adjacent swamp pā complex. The developers appealed this decision to the Environment Court, where it was defended by the trust, supported by Waitaha.

In 2005, the court largely upheld the trust's decision. It ruled that the site, while not unique, was part of a wider archaeological and cultural landscape. A significant factor was Waitaha kaumatua Tame McCausland's ability to name the pā as Te Kio and Te Paraoa to the court, associate them with specific ancestors, and describe historic patterns of occupation linking these sites on the lowland dune plains to the prominent pā on the Pāpāmoa hills.<sup>210</sup> However the court allowed some parts of the site to be destroyed on the grounds that complete protection would unreasonably interfere with use of a site zoned for commercial use.<sup>211</sup>

In some respects, this was an important victory for tangata whenua. After years of damage at Pāpāmoa, at last their heritage was being defended against development.<sup>212</sup> As Tame McCausland told the Environment Court, this was 'the last remaining area there that has not been built upon. Standing there, looking across at Te Kio and along the ridge at Paraoa, we could get a sense of how things were. When we go there we can still feel the wairua.'<sup>213</sup>

Further, the judiciary upheld their belief that a site's significance must be assessed in the context of the wider ancestral landscape. Still, the claimants regretted that the area would be surrounded by development and lose much of its landscape context.<sup>214</sup>

207. Transcript 4.7, pp 32–33; Tauranga City Council, 'Draft District Plan – Chapter 7: Heritage Rules', Tauranga City Council, <http://content.tauranga.govt.nz/districtplan/review/draft/Chapter%207.%20Heritage.pdf> (accessed 23 April 2009), p 7.19. The evidence before us conflicted as to whether the land was zoned residential or commercial. The land taken up by Pāpāmoa Junction was clearly zoned commercial. See decision no A 056/2005, Papamoa Junction Limited and Poutere Taonga (New Zealand Historic Places Trust), February 2005, p 1 (attachment to doc s33).

208. Margaret Wilson, Minister in Charge of Treaty Negotiations to Desmond Tatana Kahotea, 30 August 2004 (doc T18(a))

209. Ngā Pōtiki Resource Management Unit to New Zealand Historic Places Trust, 13 October 2000 (doc T18(a))

210. Thomas Abraham McCausland, brief of evidence to Environment Court, pp 5–7 (attachment to doc s33)

211. See decision no A 056/2005, Pāpāmoa Junction Limited and Poutere Taonga (New Zealand Historic Places Trust), pp 15–16 (attachment to doc s33)

212. Document E18, p 10

213. Thomas Abraham McCausland, brief of evidence to Environment Court, p 9 (attachment to doc s33)

214. Document s33, p 14



This decision also highlighted the lack of protection for the area in the district plan. The Tauranga City Council's failure to create the historic reserve recommended by Gumbley and Phillips was crucial: it was the best way to preserve a representative sample of the cultural landscape, one with 'great potential for wider educational and tourism purposes'.<sup>215</sup> Instead, the council chose only to list the swamp pā complex as a significant site, meaning development such as subdivision could occur as a limited discretionary activity.

A second case concerns the expansion of the Poplar Lane quarry. This quarry is located on Te Rae o Pāpāmoa, directly under Karangaumu, the largest of a series of nationally significant pā on the Pāpāmoa hills. The quarry has operated since the 1950s and was purchased in 1998 by Fulton Hogan, who proposed expanding it up the hill. The company applied for resource consents to operate the quarry for a further 15 years, which were granted by the Western Bay of Plenty District Council and Environment Bay of Plenty Regional Council. Fulton Hogan also successfully applied to the Historic Places Trust for authority to destroy archaeological sites. Both decisions were appealed to the Environment Court by tangata whenua.

Archaeological and Māori perspectives diverged on the value of the sites within the quarry. The trust had permitted the destruction of an extensively damaged pā within the quarry because so little remained intact. Despite acknowledging that the wider area around the quarry was 'part of an extensive Maori ancestral landscape of considerable Maori archaeological value', the trust argued that the affected site's values could be preserved by careful archaeological investigation.<sup>216</sup> However, tangata whenua saw this area as tapu, regardless of the historic damage done to it.<sup>217</sup> They told the court that their spiritual relationship with the land remained unaltered, as Tame McCausland explained:

The mauri is suffering because of the desecration of the earth. We cannot undo what has been done, but we want to stop the wound festering further. By protecting the mauri of the hills, we are protecting our mana as a people.<sup>218</sup>

The Environment Court upheld the resource consents, and the permission to destroy some archaeological sites. The quarry will therefore continue operations for at least another 15 years. (In fact, Fulton Hogan intends it to operate for up to 100 years.) However, the court did exclude one area of particular tapu from quarrying, and imposed strict conditions to protect other archaeological sites. Its decision was also conditional upon Fulton Hogan gifting part of their land, including the peak of Karangaumu, as part of the Pāpāmoa Hills Cultural Heritage Regional Park.

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<sup>215</sup>. Document T27, p 7

<sup>216</sup>. *Fulton Hogan Ltd v Bay of Plenty Regional Council* unreported, 10 May 2002, Environment Court, Auckland, A106/02, para 33; *Fulton Hogan Ltd v Western Bay of Plenty District Council* unreported, 28 September 1999, Environment Court, Auckland, A108/99

<sup>217</sup>. Whareoteriri Rahiri, brief of evidence, 27 September 2006 (doc s35), p 14

<sup>218</sup>. Tame (Thomas Abraham) McCausland, brief of evidence to Environment Court, [2001], p 8 (doc s35, p 18)



Figure 8.3: The Poplar Lane quarry, seen from the Pāpāmoa Hills Cultural Heritage Regional Park, circa 2000s

Photograph by Desmond Kahotea. Reproduced courtesy of Tauranga City Libraries (07–299).

This 135-hectare park overlooking the dune plain contains several substantial pā sites. That they are still so clearly evident is largely due to the sensitive farming of the McNaughton family during the twentieth century. The most prominent hill is known today as Te Rae o Pāpāmoa, but was originally named Te Kurei o Pāpāmoa by Hei, father of Waitaha, when the Arawa waka first arrived in Tauranga.<sup>219</sup> This park was created through the joint efforts of Ngā Pōtiki, Waitaha, and Ngāti Pūkenga working with three local authorities, who together bought the land – with Environment Bay of Plenty later purchasing the other councils' shares.<sup>220</sup> The park is managed and governed jointly by Environment Bay of Plenty and Te Uepū, a caucus of tangata whenua.<sup>221</sup>

The conservation plan for the park highlights other archaeological sites which form part of the wider ancestral landscape, and emphasises the importance of view lines to the Pāpāmoa dune plain and to surrounding marae.<sup>222</sup> It is an outstanding example of how

219. Thomas Abraham McCausland, brief of evidence to Environment Court, pp 2–3 (attachment to doc s33)

220. Document T18, p 39; doc s35, p 19

221. Environment Bay of Plenty, 'Papamoa Hills Regional Park Management Plan', environment report 2006/18, July 2007, pp 1, 42

222. See Robert McClean, *Sustainable Management of Historic Heritage Guidelines: Discussion Paper No 3: Heritage Landscape Values* (Wellington: Historic Places Trust, 3 August 2007), p 29

substantial portions of the ancestral landscape can gain protection. Further, the rangatiratanga and kaitiakitanga of the tangata whenua is reflected in their involvement in the park's governance and management.

#### 8.4 THE SUBMISSIONS OF THE PARTIES

In this section we present a summary of the arguments made in the legal submissions of the claimants, the Crown, and the affected local authorities. We also summarise the claimants' submissions in reply.

##### 8.4.1 Claimant submissions

The claimants' core contentions are that the Crown has failed to allow them to retain rangatiratanga and kaitiakitanga over their cultural heritage, and failed to adequately protect that cultural heritage from desecration and destruction. These contentions apply to both sites of significance such as wāhi tapu, and objects such as taonga tuturu. The claimants allege that all these breaches are ongoing.<sup>223</sup> The claimants specifically claim that:

- ▶ The Crown's legislative regime was wholly inadequate to preserve the cultural heritage of Tauranga Māori prior to the Resource Management Act 1991. It did not mention the Crown's Treaty obligations, or make provision for tangata whenua and their values in decision-making over their cultural heritage. Their cultural heritage received only incidental and ineffective legislative protections. The focus of the Historic Places Act 1954, and 1980, for example, was on protecting archaeological sites.<sup>224</sup>
- ▶ The Reserves Act 1977 makes no reference to either the Treaty, or to Māori and their values. Local authorities have no duty under the Act to recognise Māori sites of significance in reserves. This Act, still in force, is inconsistent with the Treaty, and is insufficient to protect Māori Treaty interests. It should be amended.<sup>225</sup>
- ▶ Neither the Historic Places Act 1993 nor the Resource Management Act 1991 give effect to Māori rangatiratanga over their taonga. The Historic Places Act does not contain a reference to the principles of the Treaty. The Resource Management Act requires decision makers to have regard to Māori values, but imposes no obligation to give effect to the principles of the Treaty.<sup>226</sup>
- ▶ The Historic Places Trust usurps the rightful tangata whenua role as kaitiaki of their taonga, and their right to exercise tino rangatiratanga over their taonga. Consultation

223. Document U5(a), pp 16–18, 47; doc U15, pp 19–20

224. Document U5(a), pp 24–25

225. Document U31, p 57; doc U15, pp 21, 28–29

226. Document U5(a), pp 27, 33

with tangata whenua only takes place as a result of the goodwill of the trust staff. The proper role of the trust and territorial authorities is to assist tangata whenua to manage their taonga, not to make decisions for them.<sup>227</sup>

- ▶ The Resource Management Act empowers local authorities as decision makers and excludes tangata whenua. This legislative regime has positioned tangata whenua as only ‘one of a number of interested parties’, with a limited capacity to influence the outcome.<sup>228</sup> Decisions under the Resource Management Act always require balancing a range of interests. The resulting compromises never fully reflect Māori aspirations, nor fulfil the Crown’s duty of active protection.<sup>229</sup>
- ▶ The current legislative regime does not adequately protect Māori taonga. Tangata whenua in Tauranga have lost ownership over very many sites of significance and are ‘completely reliant’ on Crown legislation. The Crown is obliged to protect taonga on all types of land, regardless of ownership; this obligation is heightened in Tauranga, given how much land has been lost, and the Crown’s role in those losses.<sup>230</sup>
- ▶ The Historic Places Act 1993 protections still focus on archaeological sites. Many wāhi tapu, however, are not archaeological sites. The Act provides for registering wāhi tapu but contains no mechanism to prevent destruction, damage, or modification of wāhi tapu. The trust has registered very few wāhi tapu in Tauranga; Māori therefore either do not know of this mechanism, or do not see it as an appropriate form of protection.<sup>231</sup>
- ▶ Archaeological heritage in Tauranga Moana continues to be destroyed at a significant rate. Very few applications to the trust to destroy traditional sites are declined. The trust admits it is insufficiently resourced, largely reactive, and has focused on salvage archaeology. Fines for the destruction of archaeological sites are insufficient to deter developers.<sup>232</sup>
- ▶ The impact of development on cultural heritage is not confined to sites, but covers broader dimensions including transformation of the ancestral landscape and the loss of cultural knowledge. Applications to destroy individual sites fail to consider the landscape context as a whole. Incremental changes to the landscape and former sites of significance threaten the cultural and spiritual relationships that Tauranga Māori have maintained within the environment of their rohe.<sup>233</sup>
- ▶ The Crown’s legislative regime for protecting taonga tuturu was wholly inadequate until the Antiquities Act 1975. The regime still fails to protect Māori taonga. Māori

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227. Ibid, pp 32–34; doc U15, p 23

228. Document U5(a), pp 27, 52

229. Ibid, pp 26–28; doc U15, p 26

230. Document U5(a), pp 18, 37

231. Ibid, pp 30–31; doc U15, p 25

232. Document U5(a), pp 34–35; doc U15, p 22

233. Document U5(a), pp 34, 37, 47; counsel for Wai 947 claimants, closing submissions, 27 November 2006 (doc U14), p 109; counsel for Wai 370 claimants, closing submissions, undated (doc U33), p 35

cannot regain taonga found before 1975. The Crown assumes prima facie ownership of newly found taonga and, despite recent legislative amendments, concerns remain over whether mechanisms for returning taonga to their rightful owners will prove effective.<sup>234</sup>

#### 8.4.2 Crown submissions

Crown counsel submitted that:

- ▶ The importance of protecting cultural heritage sites has been recognised for some time, ‘though in less comprehensive ways to those now available’.<sup>235</sup>
- ▶ The Historic Places Act 1993 must be ‘interpreted and administered to give effect to the principles of the Treaty of Waitangi, unless the context otherwise requires’ The dual governance structure of the Historic Places Trust reflects this requirement, as do the trust’s bicultural operational structures, including a Māori heritage team and pouarahi (Māori heritage advisers) based in Tauranga.<sup>236</sup>
- ▶ The Reserves Act 1977 must also be interpreted and administered so as to give effect to the principles of the Treaty, at least to the extent that its provisions are not inconsistent with those principles. The Court of Appeal confirmed this interpretation of the law in 1995.<sup>237</sup>
- ▶ It is not surprising that Tauranga’s rapid growth has had ‘significant impact on the destruction of archaeological and Māori cultural heritage’. Claimant evidence has detailed the loss of important landmarks such as pā sites and taonga. However, since development will often be on privately owned land, where time and energy has been invested in proposals for development ‘a balance [must] be struck between protection of archaeological sites and allowing growth and development . . . Striking such a balance is consistent with Treaty principles’.<sup>238</sup>
- ▶ The Historic Places Trust works to protect archaeological sites by involvement in the local authority planning process; educating developers; and declining authorities to modify sites. Though the trust has a significant workload in Tauranga, it is meeting its responsibilities under the Historic Places Act. Over the last five years resources provided to the trust have steadily increased.<sup>239</sup>
- ▶ Of 138 authorities granted to modify archaeological sites the trust granted between 2002 and 2006, most (122) were decided in accordance with the views of tangata whenua. Not all authorities granted result in destruction of the site. The trust has

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234. Document U15, pp 15–18

235. Document U29, p 31

236. Ibid, pp 32–33

237. Crown counsel, supplementary closing submissions, 12 February 2007 (doc U42), p 2

238. Document U29, pp 25, 36–37

239. Ibid, pp 35–36, 40



declined four applications for authority to destroy archaeological sites. Where sites are destroyed, investigation ensures that information is preserved for future generations.<sup>240</sup>

- ▶ Though Māori and the trust had pressed for greater protection of Pāpāmoa in the 1980s, much of what we now know about this area's archaeology and occupation was not available at that time. Archaeological practice and the requirements for authorities for destruction to be granted have both since been improved. The trust has initiated an overview of the state of knowledge about Pāpāmoa to allow a planned response to future applications for large-scale development.<sup>241</sup>
- ▶ Wāhi tapu are protected under the Historic Places Act and Resource Management Act by requiring territorial authorities to have regard to entries in the Historic Places Register when preparing plans; four wāhi tapu areas have been registered in Tauranga. The relationship of Māori to wāhi tapu is a matter of importance that must be recognised under the Resource Management Act in both making plans and in issuing resource consents.<sup>242</sup>
- ▶ The Waitangi Tribunal has previously found that prima facie Crown ownership of Māori artefacts is an important protection, provided that there is an automatic process in place to determine the true owners. The Māori Land Court has had the power to determine traditional ownership since 1975. The recently passed Protected Objects Amendment Act enhances the procedures for determining true ownership.<sup>243</sup>
- ▶ In sum, there has been an incremental recognition of the need to provide for Māori and their values, and an increasing awareness of the importance of protecting cultural heritage.<sup>244</sup> The result of this recognition is seen in the development of legislative requirements in planning and heritage protection legislation from the mid-twentieth century onward.<sup>245</sup> The Crown considers that its Treaty obligations are now discharged by promoting these measures in Parliament and by the subsequent actions under these provisions by local authorities.

#### 8.4.3 Local authority submissions

Counsel made closing submissions on behalf of the three local authorities with jurisdiction in the inquiry area, to the effect that:

- ▶ Local authorities are not agents of the Crown and are not a Treaty partner. Local authorities are creatures of statute. Local bodies had no power to act outside the provisions

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240. Ibid, pp 36–39

241. Ibid, pp 38, 40

242. Ibid, pp 39–40

243. Ibid, p 41

244. Ibid, pp 5, 31–32

245. Ibid, pp 6–19, 26–27, 31–36



8.4.4

laid down by statute. Any deficiency ‘does not belong to those who implement [the law], but to those who write it.’<sup>246</sup>

- Prior to the Town and Country Planning Act 1977 legislation did not make specific provision for Māori, and the provisions in that Act were constrained until 1987 by a explicit legal ruling to relate only to land owned by Māori.<sup>247</sup>
- The claimant summary of the Reserves Act 1977 as it relates to Māori interests is accepted: the Act contains no Māori or Treaty provisions, nor do local authorities have any duty to recognise particular Māori features, wāhi tapu or sites of significance in relation to reserves. Therefore local authorities cannot be held to a ‘Treaty standard’ with respect to their responsibilities under the Reserves Act.<sup>248</sup>
- Local Government legislation prior to the Local Government Act 2002 contained no express reference to the Treaty or its principles, nor any statutory direction to take account of those principles.<sup>249</sup>
- The two principal statutes under which the local councils operate today are the Local Government Act 2002 and the Resource Management Act 1991. These Acts do not require local authorities to give effect to the Treaty.
- Claimants who choose not to participate in the statutory processes provided cannot legitimately criticise the councils for failing to take their interests into account.<sup>250</sup>

**8.4.4 The claimants’ replies**

Claimants replied that:

- The Crown’s submission that it must strike a balance between protection of heritage and allowing development is flawed on two grounds. First it is inconsistent with the Treaty for the Crown to balance the Treaty right of Māori to rangatiratanga over their resources and taonga.<sup>251</sup> As the Tribunal has previously found, ‘The balancing act is a statutory requirement [that] should be attributed not to the Treaty but to its source – the statute.’<sup>252</sup> Second, it ignores what has actually occurred: wholesale destruction of Tauranga’s cultural heritage.<sup>253</sup>
- The Crown’s submission that the Historic Places Act weighs archaeological and Māori cultural values equally in assessing applications to destroy archaeological sites does not

246. Document U39, pp 5–6

247. Ibid, pp 9–10

248. Ibid, pp 28–29

249. Ibid, p 34

250. Ibid, p 3

251. Paper 2.655, pp 2–3; paper 2.656, pp 7–8

252. Waitangi Tribunal, *The Whanganui River Report* (Wellington: Legislation Direct, 1999), pp 320–321

253. Paper 2.655, p 4; paper 2.656, p 11

address the claimants' main point: the Act's principal protection mechanism addresses only archaeological sites.<sup>254</sup>

- The Crown's submission that a lack of knowledge mitigates destruction at Pāpāmoa only reinforces the fact that the Historic Places Act is flawed because it vests the Historic Places Trust, and not Māori, with the responsibility for identifying and protecting Māori heritage.<sup>255</sup> The Crown has responsibility for the actions of local authorities and has a duty to ensure that they operate under legislation that gives effect to the principles of the Treaty. Local authorities in Tauranga do not believe they have to meet a Treaty standard, for example in the management of reserves such as Kauri Point, which is a clear indictment of the Crown's legislation.<sup>256</sup>

## 8.5 TRIBUNAL DISCUSSION, ANALYSIS, AND FINDINGS

Tauranga Māori feel a very deep sense of loss because of a history of desecration and destruction of their cultural heritage. The Crown concedes that Tauranga's development has had 'significant impact on the destruction of archaeological and Māori cultural heritage'.<sup>257</sup> We have detailed many of the losses to taonga in this and previous chapters (particularly the public works and natural environment chapters). We now assess the Crown's role and responsibility in how these losses came to pass, in view of the issues posed at the beginning of this chapter.

### 8.5.1 Has the Crown historically protected the tino rangatiratanga and kaitiakitanga of Tauranga Māori over their cultural heritage?

#### (1) *Discussion of the facts*

The claimants submitted that, until comparatively recently, the Crown made no legislative provision whatsoever for Māori to exercise rangatiratanga over their taonga and act as kaitiaki of their taonga. They argued this omission was inconsistent with the principles of the Treaty, in particular with the principle of active protection.<sup>258</sup>

The Crown's submissions did not discuss whether past legislative regimes allowed Māori to exercise rangatiratanga and act as kaitiaki over wāhi tapu and other sites of cultural significance. However, the Crown made some concessions regarding taonga tuturu. Witnesses for the Ministry of Culture and Heritage conceded that, until 1975, the legislation regarding taonga tuturu was ineffective in achieving its very limited purposes, including the return of

254. Paper 2.656, p 10; paper 2.663, pp 20–21

255. Paper 2.656, p 11

256. Paper 2.655, p 7

257. Document U29, p 36

258. Document U5(a), p 18; doc U14, p 109

taonga to Māori possession. The Crown also conceded that the operation of the Antiquities Act 1975, meant to eliminate acknowledged flaws in previous legislation, itself perpetuated several deficiencies. In particular, the Crown conceded that the 1975 Act had not, in practice, succeeded in allowing Māori to claim ownership of their taonga as it was intended to do. The Protected Objects Act 2006 has since been designed to remove the obstacles that have hampered Māori in their efforts to regain ownership of their taonga.<sup>259</sup>

The Crown did not address the issue of whether Māori ought to have been able to historically exercise rangatiratanga and kaitiakitanga. The Crown did, however, argue that it was itself limited in its ability to legitimately control activity on private land. The Crown noted that damage or destruction to archaeological sites often occurs on 'privately owned land with owners of that land having invested considerable time and energy in proposals for its development'.<sup>260</sup>

This raises the issue of how the Crown might give effect to Māori rangatiratanga and kaitiakitanga over cultural heritage on land no longer owned by the tangata whenua. As the *Hauraki Report* put it:

We are asked to consider how the intertwining worlds of people and their cultural and spiritual environment can be effectively translated into legislation, and how, if ownership of the land has been lost, links with the past and future can be preserved and acknowledged.<sup>261</sup>

This is a very broad and complex question, which we address much more fully in sections 8.5.5 and 8.5.7, when discussing the current regime. Here we simply acknowledge that balancing Māori Treaty rights against public rights of access or private property rights cannot ever be easy. Nevertheless, this in no way excuses the Crown from attempting to find legislative solutions, tailored to prevailing circumstances, that met its obligations under the Treaty.

Tauranga Māori must rely on Crown legislation to enable them to exercise rangatiratanga and kaitiakitanga over cultural heritage on land they no longer own.<sup>262</sup> No such protection was available until 1987, when the Planning Tribunal ruled that Māori retained interests in their ancestral lands regardless of tenure (and this ruling had no real chance of taking effect prior to the passing of the Resource Management Act in 1991).<sup>263</sup> Before then, in the instances that we have discussed, including those on public land such as Kauri Point Reserve and Bowentown Domain, Māori were, as Basset and Kay put it, 'invisible'. It must be stressed that there are very many other cases we have not discussed.<sup>264</sup> In all such cases,

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259. Document U29, pp 41–42; doc T14, pp 10–11; 'Laws, Policies and Practices Relating to the Protection of Moveable Cultural Property 1901–1999', pp 1–5 (attachment to doc T14); transcript 4.6, pp 33–35

260. Document U29, p 36

261. Waitangi Tribunal, *The Hauraki Report*, vol 3, p 935

262. Document U5(a), p 37

263. *Royal Forest and Bird Protection Society (Inc) v WA Habgood Ltd* (1987) 12 NZTPA 76

264. Some of these however are mentioned in chapter 4, dealing with the impacts of public works.

Tauranga Māori could not participate in, let alone exert any control over, the processes that shaped the fate of their ancestral landscape. Tauranga Māori frustration at this state of affairs is clearly evident in the plaintive submission in 1982 from the Tauranga Moana Māori Trust Board that local authorities should take seriously Māori complaints about people digging up wāhi tapu in search of their ancestral artefacts.<sup>265</sup>

Even where Tauranga Māori have retained ownership of their land, they could not always exercise the authority to control activity that might affect their wāhi tapu and other sites. This problem is graphically illustrated in the case of the quarrying of their maunga tupuna and wāhi tapu Mangatawa. Clearly, extremely significant historic and cultural values were at stake in the struggle over Mangatawa.

## (2) Treaty analysis and findings

Several previous Tribunals have found that the Crown's legislative regimes for the protection of wāhi tapu and other significant sites have not fulfilled its Treaty obligations.<sup>266</sup> The *Hauraki Report*, for example, found that Crown legislative protection was 'not adequate for much of the nineteenth and twentieth centuries'.<sup>267</sup> The *Hauraki Report* also found that Māori should have always retained Treaty rights to have their relationship with significant sites treated with respect, regardless of the ownership of land, and that the Crown's obligations to secure this right are strengthened where extensive land loss has occurred.<sup>268</sup>

The Crown did not provide any historical examples of Māori participation in statutory processes that might have provided protection for their taonga in Tauranga. In contrast, we heard a wealth of evidence from the claimants that they had been unable to exercise rangatiratanga and kaitiakitanga over their taonga.

We therefore concur with the findings of the Hauraki Tribunal. The Crown's legislative framework did not adequately allow Tauranga Māori to exercise authority and control over the taonga of their cultural heritage. Their right to such authority and control was explicitly protected by article 2 of the Treaty. In addition, all people have a right to play a significant part in determining the fate of the most treasured aspects of their cultural heritage. This right was denied to Tauranga Māori even over their most significant ancestral places. By failing to adequately provide for the exercise of rangatiratanga and kaitiakitanga by Tauranga Māori over their sites of significance, the Crown has breached the principle of partnership and the duty of active protection.

We find that Tauranga Māori have suffered significant prejudice as a result of the loss of authority and control over taonga and wāhi tapu on lands which, as discussed in the stage 1

265. 'Maori Cultural Values and Planning for Tauranga Harbour: Submission to Tauranga County Council and Bay of Plenty Harbour Board from Tauranga Moana District Maori Council' (doc A18, p38)

266. Waitangi Tribunal, *The Te Roroa Report* 1992, pp 229–257; Waitangi Tribunal, *The Hauraki Report*, vol 3, p964

267. Waitangi Tribunal, *The Hauraki Report*, vol 3, p964

268. Ibid, pp 963–964

report, and in earlier chapters of this report, were often wrongly taken from them through raupatu, or alienated in circumstances and processes such as those of Native Land Court, which we have found did not comply with the principles of the Treaty. Indeed, for some landless iwi and hapū, such sites of significance are their only remaining link to their ancestral landscape in Tauranga. Their inability to participate in decisions over the fate of those sites has caused great anguish to Tauranga Māori, as they have, all too often, been impotent witnesses to the subsequent destruction and desecration of their heritage.

### **8.5.2 Has the Crown been historically responsible for destruction and desecration of the cultural heritage of Tauranga Māori?**

#### **(1) Discussion of the facts**

Claimants and the Crown agreed that Tauranga is an area rich in archaeological sites, and that, as the Crown submitted, ‘the rapid growth occurring in Tauranga has had a significant impact on the destruction of archaeological and Māori cultural heritage.’<sup>269</sup> They disagreed over whether, and to what extent, the Crown has been at fault in causing this destruction, or in allowing it to occur.

The claimants argued simply that their taonga ought always to have been protected by the Crown under article 2 of the Treaty. The Crown has conceded that, though the importance of protecting cultural heritage has been recognised for some time, its regimes attempted to do so ‘in less comprehensive ways to those now available.’<sup>270</sup> However, while the Crown accepted that significant taonga always deserved protection, it argued, following the evidence of the trust’s senior archaeologist, Richard McGovern-Wilson, that this area has been so densely settled that ‘it would be hard to find any location that does not potentially contain archaeological sites.’<sup>271</sup> The Crown submitted therefore that ‘[i]t is not surprising’ that significant destruction has occurred because of the development of Tauranga. It argued a balance has inevitably had to be struck between allowing private property owners to develop their land, and the protection of Māori sites of significance. The Crown stated that striking such a balance is consistent with the Treaty.<sup>272</sup>

If the Crown is to balance the need for development against the need to protect heritage, it must clearly do so in ways that do not discriminate against Māori heritage. This is particularly so, given that the vast majority of heritage sites in Tauranga Moana reflect the long ancestral occupation of the tangata whenua. Yet as we have seen, in the early and mid-twentieth century there was very little protection for Māori heritage. During this period, the Crown provided much stronger protections for archaeological sites – more accurately,

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269. Document U29, p 36

270. Ibid, p 31

271. Document T29, p 6; doc T24, pp 8–9

272. Document U29, pp 36–37

the information contained in archaeological sites – than for Māori cultural sites. Admittedly, Louise Furey's evidence suggested that this legislation had very limited impact prior to the Resource Management Act, because the Historic Places Trust suffered badly from a lack of resources and staff. Only nominal protection was provided even during the late 1970s and early 1980s while many of the archaeologically pristine landscapes of the western Bay of Plenty were reshaped by intensive horticultural development.<sup>273</sup> The trust was then badly stretched to simply record the sites of the western Bay of Plenty; it was quite unable to protect them.

The fact remains that, prior to the 1990s, much lower and belated standards were provided to the sites Māori regard as significant. 'Traditional' sites did not gain the range of significant protections that were afforded to archaeological sites and in particular to historic buildings, which included provisions for protection notices, recording these notices on land titles, and notifying sites on district plans.<sup>274</sup> Instead, the trust was empowered only to 'recommend proposals . . . for [their] recognition and preservation.'<sup>275</sup> In effect, it could only negotiate protection through agreement with interested parties. Tipene O'Regan, involved with the trust from 1977, noted 'considerable resistance from professional archaeologists' to attempts to secure an equal level of protection for sites of Māori value throughout the 1970s and 1980s.<sup>276</sup> As O'Regan put it, it was 'easier to protect an ancestral rubbish dump than a tuahu or a waka landing site or a maunga whakatauaki.'<sup>277</sup> As the *Manukau Report* concluded, therefore, under this legislation there was: 'one standard for sites of significance to New Zealanders as a whole, and another lesser standard for sites of significance to Maori people.'<sup>278</sup>

In our hearings we heard of many cases where Māori values were not recognised, and there was little evidence of any attempt to find balance. The heritage of Matakana Island hapū, for example, has clearly suffered very badly from the development of commercial pine forests. Archaeologist Douglas Sutton told us that the ancient, intensive, and continuous occupation of Matakana Island was amply documented in early maps which contained 'many names, many named places, many swamps, many settlements, many tracks', and within the landscape itself, in the form of many thousands of archaeological sites.<sup>279</sup> Yet, Sutton argued, through promoting the development of forestry, and ignoring the significant Māori heritage on the island, the Crown has largely been responsible for the fact that the

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273. Transcript 4.4, p 19

274. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, 2nd ed (Wellington: Waitangi Tribunal, 1989), pp 61–62

275. Historic Places Act 1980, s 50(4)

276. Waitangi Tribunal, *The Te Roroa Report 1992* (Wai 83 record of inquiry, doc G2, pp 3–4), p 233

277. Ibid

278. Waitangi Tribunal, *Manukau Report*, p 62

279. Douglas Sutton, transcript of evidence, undated (doc J43), pp 5–7



‘the people of Matakana have been deprived of their historic places’ as the island has been ‘scoured of the evidence of their past presence.’<sup>280</sup>

Clearly, many Matakana Island Māori have been employed by the commercial enterprises which have conducted the Matakana forestry industry, and indeed they now operate one such enterprise themselves. It is not, therefore, the development of forestry per se that is at issue. The essence of their legitimate grievance is that past forestry enterprises paid little to no heed to wāhi tapu sites and significant pā in conducting their operations, and they were not required to do so by the Crown.<sup>281</sup> In this sense we can concur with Sutton that ‘[t]he degree of damage has been awful, the cause of the damage was egregious, and the damage could readily have been avoided.’<sup>282</sup>

Similarly, we heard that Ngāti Hinerangi were not consulted in any way during the lengthy debate over whether to construct the Kaimai tunnel and deviation, despite the fact that these were their ancestral lands.<sup>283</sup> The Crown paid no heed to their perception of the Kaimai Range as sacred, ‘a living entity, with its own mauri and life force’, and a place where ‘our tupuna and our rangatira have been buried in the caves and rock formations to ensure they will always be protected.’<sup>284</sup> Ngāti Hinerangi submitted that, owing to the enormous engineering works required to construct the tunnel and its approaches, they suffered prejudice on a number of counts: a loss of mana and identity; a loss of their sacred maunga; violation of tapu; and environmental injury caused by ‘the massive alteration of the ancestral landscape, pollution of waterways, [and] changes to the courses of rivers and streams.’<sup>285</sup>

In comparatively rare cases where a Māori cultural interest was acknowledged as existing, such as at Mangatawa, we saw that this legislative regime afforded minimal protection. This was a case of ongoing destruction, by high explosive, of what one witness described to us as ‘the largest and possibly oldest urupa in the Bay of Plenty.’<sup>286</sup> Since archaeological values that regarded a site as less important once it had been damaged prevailed, past modification of sites justified further destruction; but for Māori, the ongoing violation of tapu was the most distressing concern.

The trust’s feeble attempts at protection reflect an era when, as O’Regan put it, ‘[t]he rights of private property owners were fiercely protected and there was huge resistance to any steps to protect anything Maori that could be seen to interfere with those rights.’<sup>287</sup> However, it is notable that in this instance, Māori determinedly retained the freehold to

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280. Douglas Sutton, transcript of evidence, undated (doc J43), pp 5–7

281. Jason Conan Murray, brief of evidence, 17 June 2006 (doc R47), pp 9–10

282. Document J43, p 7

283. Morehu McDonald, ‘Summary of Ngati Hinerangi Grievances Relating to the Building of the Kaimai Tunnel and Deviation’ (commissioned research report, Wellington: Waitangi Tribunal, 2006) (doc S1(a)), pp 48–49

284. Morehu McDonald, ‘Ngati Hinerangi Grievances Relating to the Building of the Kaimai Tunnel and Deviation’ (commissioned research report, Wellington: Waitangi Tribunal, 2006) (doc S1), p 232

285. Ibid, p 252

286. Document R30, p 23

287. Waitangi Tribunal, *The Te Roroa Report 1992*, p 232

their land at Mangatawa, and it was Māori private property rights that were at issue; the Ministry of Works and Mount Maunganui Borough Council only held licences to quarry and build a reservoir, respectively. This was an instance where Māori owners attempted to buttress their property rights by gaining recognition for the historic and cultural values of their land. It is a measure of the weakness of the legislative regime for heritage protection at this time that, when faced with Ministry of Works and council intransigence, the trust simply allowed their plans to continue essentially unmodified.<sup>288</sup> In sum, the statutory process did nothing to halt the continuation of decades of desecration of a site in Māori ownership which, in European terms, might be likened to a cathedral with a crypt. This is inconsistent with the Treaty principles of active protection and equity.

Finally, it is telling that, though the Crown advanced the Historic Places Acts of 1954 and 1980 as providing a legislative balance to property rights, it did not present a single instance where Tauranga Māori actually gained protection for their cultural heritage under those regimes. The evidence suggests in fact that very few significant sites in Tauranga gained even a nominal degree of statutory recognition. And those that did, such as Mangatawa, were not thereby protected from damage.

## **(2) Treaty analysis and findings**

Throughout the period from 1886 to 1990 the Crown provided Māori heritage less protection than Pākehā heritage. Not a single example was provided of successful protection of Māori heritage, and we heard many stories of the destruction of and degradation of ancestral sites and landscapes. Pā, kāinga, urupā, and wāhi tapu were often simply bulldozed, to make way for infrastructure and farming. In such cases, we heard, the remains of ancestors were often unceremoniously unearthed, and sometimes reburied as spoil in making roads, causeways, and wharves.

All cultures greatly value their heritage. There can be no justification for the Crown's disregard for the taonga of Māori culture, and its treatment of Māori heritage as of lesser importance than Pākehā heritage. That it did so consistently throughout the period from 1886 to 1990, constituted a sustained breach of the plain meaning of the Treaty, and also of the principle of equity and the duty of active protection.

### **8.5.3 Can Māori now exercise rangatiratanga and kaitiakitanga over their cultural heritage?**

#### **(1) Discussion of the facts**

Claimants and the Crown disagree over whether the current legislative regime can and does allow Māori to exercise rangatiratanga and kaitiakitanga over their cultural heritage.

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288. Document A44, pp 38–41

TAURANGA MOANA, 1886–2006

8.5.3(1)

Claimants argue that, instead of being decision makers with respect to their taonga, tangata whenua are reduced to being but one of a number of interested parties, with limited influence over decisions.<sup>289</sup> The Crown did not squarely address whether Māori can exercise rangatiratanga and kaitiakitanga, but it argued its Treaty obligations are discharged through the provisions designed to foster Māori participation in the decisions of local authorities, and the actions of those authorities.<sup>290</sup>

In 1992 the Te Roroa Tribunal provided a sustained analysis of the proper role of tangata whenua and the Crown in the management of Māori cultural heritage. That Tribunal found that Māori participation in what others decide to do with their taonga is not the proper partnership envisaged by the Treaty:

Wahi tapu are taonga of Maori, acknowledged as such in article 2 of the Treaty. The role of the department and Historic Places Trust in the 'partnership' is not a decision making role or being 'included' in what is not theirs. Rather, it is to assist Te Roroa by the provision of services and advice when they are sought, to enable them to protect and care for the wahi tapu.<sup>291</sup>

That Tribunal further proposed that the Crown:

re-affirms the traditional and Treaty rights of tangata whenua to control and protect their own wahi tapu and requires the Department of Conservation and other of its agents concerned in the management of national and cultural resources to give practical effect to this commitment.<sup>292</sup>

We endorse these findings of the Te Roroa Tribunal. The issue is whether Crown legislation and policy has since evolved to enable Tauranga Māori to exercise rangatiratanga (authority and control), and act as kaitiaki (protect and care for) over their cultural heritage?

Before we address this issue however, we need to make clear that the capacity of the Crown to enable Māori to exercise rangatiratanga and to act as kaitiaki will differ depending on the specific category of land at issue, for example, Crown land, public land owned by local authorities, and private land. The latter categories present particularly complex problems of how to best reconcile public rights of access and enjoyment, or the legitimate property rights of private landowners, with the equally legitimate right of tangata whenua to retain links to their significant sites within their ancestral landscape. These issues are further complicated in situations where Māori have lost their ancestral lands in ways inconsistent with the principles of the Treaty. We acknowledge the complexity of the issues involved,

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289. Document U5(a), p 52

290. Document U29, pp 17–18

291. Waitangi Tribunal, *The Te Roroa Report 1992*, p 254

292. *Ibid*, p 294

but consider that the Crown and Māori must not resile from cooperating to find avenues for the expression of Māori rangatiratanga and the exercise of kaitiakitanga.

To this day neither the Historic Places Act nor the Resource Management Act provide Tauranga Māori with any straightforward mechanisms to exercise rangatiratanga and act as kaitiaki over their ancestral places on any of these categories of land. One mechanism which might come closest is the possibility, under both the Historic Places Act and Resource Management Act, that Māori groups might become heritage protection authorities, able to issue heritage protection orders. Under the Resource Management Act, an iwi authority, Māori trust, or incorporation, can in theory become heritage authorities if constituted as a body corporate, and if the Minister for Culture and Heritage accepts their application.

The Te Roroa Tribunal commented that there may be several issues for Māori in considering undertaking this process. First, that Tribunal felt that the requirement to be a body corporate was inappropriate, since the trustees who administer marae, the cultural foci of Māori communities, do not constitute a body corporate. We note, however, that trusts and incorporations established under Te Ture Whenua Māori Act 1993, and Māori trust boards, are body corporates.<sup>293</sup> Secondly, disclosing the location of wāhi tapu and scrutiny at public hearings could pose threats to their security. Thirdly, and most significantly, substantial costs are involved in making a heritage order, including one-off costs for applying (and a high likelihood of appeal) and ongoing costs in processing resource consent applications. In particular, landowners can apply for compulsory purchase and compensation by the heritage authority if they cannot sell or use their land in a reasonable manner.<sup>294</sup> Making a heritage order therefore inevitably involves significant delays, financial costs, and considerable risks; as the Parliamentary Commissioner for the Environment noted in 1996, it is a last resort option for protection.<sup>295</sup>

The potential costs involved are clearly the most significant obstacles to Māori groups becoming a heritage protection authority. These costs may be unavoidable, since there is clear likelihood of conflict between the wider public and tangata whenua interest in heritage protection, and the rights of private property owners. Such conflicts can often be defused through clear and open consultation, and negotiation in good faith. However, in some situations compensation to property owners may well be required, and in the last resort outright purchase may have to be contemplated.<sup>296</sup>

293. Ministry for the Environment, 'Tools for Greater Maori Participation', Ministry for the Environment, <http://www.mfe.govt.nz/publications/rma/ki-teuo-te-hiahia/html/page5.html> (accessed 21 October 2009)

294. David Derby, 'Background Paper to Managing Maori Ancestral Lands, Sites, Wahi Tapu and Archaeological Sites under the Resource Management Act and Other Associated Legislation' (Wellington: Historic Places Trust, 1999), p 34

295. Parliamentary Commissioner for the Environment, *Historic and Cultural Heritage Management in New Zealand*, pp 63–65

296. Ibid, p 64

Recognition of the need for greater protection of New Zealand's heritage grows steadily, yet there is no national fund available for heritage authorities to use to offset the compensation requirements of a heritage order. The need for such a fund was pinpointed by the Parliamentary Commissioner for the Environment in 1996, and such funds are used elsewhere, for example in New South Wales.<sup>297</sup> According to David Darby, who assessed the management of Māori historic heritage for the Historic Places Trust in 1999, the lack of such a fund 'makes the process almost unusable'.<sup>298</sup>

Indeed, in over fifteen years, only five body corporates, none of them Māori organisations, have become heritage protection authorities.<sup>299</sup> We know of only one attempt by an iwi to become a heritage protection authority, but this was met with sustained hostility by both local and central government. Their application was declined by central government, and though the courts specifically directed that this decision was wrong and should be revisited, it appears nothing was done.<sup>300</sup> To date, therefore, this has been an ineffective mechanism for heritage protection, particularly for Māori. The Resource Management Act provides a wider range of possibilities for Māori to exert influence, if not authority, over decisions taken with regard to their taonga. Māori can come closest to exercising rangatiratanga and kaitiakitanga through provisions in the Resource Management Act for the transfer, delegation, or sharing of powers by local authorities.<sup>301</sup>

We note that some power-sharing arrangements have been reached in Tauranga, all of which have relevance to cultural heritage management. In 2004, the three local authorities were all involved in the Pāpāmoa Regional Cultural Heritage Park and SmartGrowth strategy, cited by the councils as examples of joint management. Tauranga City Council also cited the management arrangements of Mauao, the Kōpūrereroa Valley, and a museum, as further examples of co-management.<sup>302</sup> With the exception of SmartGrowth (discussed in chapter 7) we were not provided with the exact arrangements reached in these cases. They all appear however to involve tangata whenua inclusion in management committees or steering groups that exercise power delegated from the local authority (with the notable exception of the museum project, which is now defunct).

297. Allen, p 34; Parliamentary Commissioner for the Environment, *Historic and Cultural Heritage Management in New Zealand*, p 97

298. Darby, p 34

299. Ministry for the Environment, 'Heritage Orders and Heritage Protection Authorities', Ministry for the Environment, <http://www.mfe.govt.nz/rma/central/heritage/index.html> (accessed 21 October, 2009)

300. Te Rūnanga o Ngāti Pikiao applied to become a heritage protection authority for part of the Kaituna River in the Bay of Plenty. This case is discussed in the *Maori Law Review*, July 1999.

301. The Resource Management Act 1991, s 33 allows for the transfer of functions, powers and duties to iwi authorities. The Resource Management Act 1991, s 34 allows for powers to be delegated to any committee of the local authority (and such committees can be wholly or partially composed of tangata whenua). Since 2003, the Resource Management Act s 36 has allowed for joint management agreements in respect of any of their functions, powers, and duties.

302. Local Government New Zealand, 'Local Authority Engagement with Māori: Survey of Current Council Practices', July 2004, pp 39–40; draft agreement between Ngai Tamarawaho and Tauranga District Council, undated (doc F32(a))

These are significant steps towards providing for Māori rangatiratanga, though in no cases do tangata whenua assume powers of decision-making over the resources that are their taonga. Rather, as Harry Allen, board member of the Historic Places Trust between 1988 and 1998 and an adviser to the Māori Heritage Council, has noted, the Resource Management Act creates ‘a web of statutory procedures but locates the management of places significant to Maori in the hands of territorial authorities, who at best can only protect a minority of selected places. This falls well short of Maori expectations.’<sup>303</sup>

Accordingly, the most that tangata whenua have achieved to date is inclusion within council management structures.<sup>304</sup> We note that councils in Tauranga have not yet fully transferred any of their powers to iwi, or allowed iwi to control these committees. Yet, these examples suggest the local authorities in Tauranga are beginning to accept the principle that Māori ought to have a measure of authority and control over their taonga, at least on reserve land owned and controlled by authorities. This is therefore an appropriate point to consider the basis for a wider acknowledgement of Māori authority and cultural values in an issue that has long been critical to Tauranga Māori: the management of reserves.

The management of public reserves is crucial to the ongoing protection of cultural heritage in Tauranga Moana. These reserves contain very many pā, wāhi tapu, urupā, and other significant sites. They are also fast becoming rare and precious places where remnant vestiges of cultural landscapes may be preserved in the midst of rapid development. Yet the claimants and, most significantly, the local authorities themselves, each submitted that the Reserves Act 1977 does not require local authorities to give effect to the principles of the Treaty in the management of reserves.

This is incorrect. The Crown submitted, correctly, that the Reserves Act 1977 must be interpreted and administered so as to give effect to the principles of the Treaty. The Reserves Act is listed in schedule 1 of the Conservation Act 1987, and section 4 of that Act requires it to be interpreted and administered so as to give effect to the principles of the Treaty of Waitangi. Case law confirms that the Minister of Conservation is bound to give effect to the principles of the Treaty when administering the Reserves Act 1977.<sup>305</sup> Section 10 of the Reserves Act states that local authorities’ powers over reserves are delegated from the Minister; they must therefore be exercised in the same manner, and with the same effect, as if they had been directly conferred upon that person. Hence, those legislative provisions that bind the Minister also bind the local authority.

Confusion over this issue is quite understandable however. Until 1995, the Department of Conservation itself did not accept that it had to give effect to the Treaty in administering Acts that do not specifically refer to the Treaty. And it only accepted this reluctantly,

303. Allen, p 22

304. For discussion see Janet Stephenson, ‘Recognising Rangatiratanga in Resource Management for Maori Land: A Need for a New Set of Arrangements?’, *New Zealand Journal of Environmental Law*, vol 5, no 5 (2001), p 189.

305. See *Te Waero v Minister of Conservation* unreported, 19 February 2002, High Court, Auckland, M360-SW01, p 11 per Harrison J



after the courts ruled – against the Department – that this was the proper interpretation of the law. Even this ruling applied only to situations where the principles of the Treaty are not clearly inconsistent with the provisions of the Act in question.<sup>306</sup> The purposes of the Reserves Act focus primarily on preservation of natural ecosystems, landscapes, and character, and on ensuring public access to such places.<sup>307</sup> Cultural heritage, and in particular Māori cultural heritage, is not mentioned.

As the *Te Tau Ihu Report* commented, when this kind of thinking about the Treaty prevails in government, Māori cannot safely rely on a healthy, Treaty-consistent relationship; they require ‘legally enforceable rights’.<sup>308</sup> It is evident that local authorities do not believe they must give effect to the Treaty and that Tauranga Māori do not always enjoy a healthy and Treaty consistent relationship with them in the management of reserves. We heard all too many comments to the effect of Reon Tuanau’s conclusions about the management of Bowentown Domain that ‘[w]e are in effect still ignored by Council’.<sup>309</sup> In such cases a significant gap still exists between the council’s belief, on the one hand, that it is sufficient to consult Māori in preparing their management plans, and Māori desire, on the other, to actively participate in ongoing governance and management decisions.

There is a very clear need for the Crown to actively inform local authorities of their statutory responsibility to give effect to the Treaty in administering the Reserves Act. Ideally this responsibility should be set out in clear and unambiguous legislation through an amendment to the Reserves Act. This would provide a clear directive to local authorities that Māori rangatiratanga must be given effect to in the management of reserves.

To give effect to Māori rangatiratanga, it would be appropriate that local authorities transfer or share their powers over those reserves that contain sites of especial significance to iwi. Transfers of power, or power-sharing arrangements, are appropriate under the Resource Management Act when local and iwi authorities agree that an iwi authority represents the appropriate community of interest, when the arrangement would be efficient, and has technical or special capability or expertise.<sup>310</sup> We are in no doubt that the tangata whenua might represent the appropriate community of interest in relation to reserves such as those that we have discussed: the Bowentown Reserve, the Kauri Point Reserve, and Huharua Harbour Park. As found in the Tribunal’s stage 1 report, these reserves are part of the ancestral lands of tangata whenua, often wrongly confiscated, or sold without the consent of the community, and never returned to them. In these areas where their cultural heritage is particularly concentrated, tangata whenua have greater interests than the public at large.

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306. Waitangi Tribunal, *Te Tau Ihu o Te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 3, p 1204

307. Reserves Act 1977, s 3

308. Waitangi Tribunal, *Te Tau Ihu o Te Waka a Maui*, vol 3, p 1204

309. Document R20, p 5

310. Resource Management Act 1991, ss 33, 36

We note that all transfers of power that have occurred to date have occurred between regional and local authorities, and all have been initially justified on the grounds of efficiency.<sup>311</sup> Since no transfers have been made to iwi, it appears councils are reluctant to believe iwi management might ever be more efficient. Yet, though iwi will undoubtedly need fiscal support for administration and day-to-day reserve management, which indicates to us that a sharing of powers might be most appropriate as an initial step, we see no reason whatsoever to assume, in advance, that Māori will ultimately prove less-efficient managers of their ancestral lands than the bureaucracy of local government. It should go without saying that the tangata whenua have special capability and expertise in the management of their cultural heritage. We note that councils can rescind any transfer of power if they find that the criteria are not being met.

We stress, however, that whatever form iwi participation in reserve management might take, all those responsible for reserve management would still be bound by the Reserves Act, and would have to allow for continued public access and enjoyment.

## (2) *Treaty analysis and findings*

The Treaty obliges the Crown to actively provide for and protect Māori rangatiratanga over their taonga. We endorse the finding of the Te Roroa Tribunal, that the correct role of the Crown and its agencies is to assist Māori ‘by the provision of services and advice when they are sought, to enable them to protect and care for wahi tapu.’<sup>312</sup> As stated by archaeologist Harry Allen, ‘Maori have a right to participate fully in decision-making regarding all Maori historic places, archaeological sites and wāhi tapu whether they are on privately-owned lands or not.’<sup>313</sup>

The Crown’s legislative regime provides some mechanisms that might, in theory, allow Māori to protect and care for their wāhi tapu. These are the provision that Māori groups might (as iwi authorities, or other forms of body corporate) become heritage protection authorities, and the provision for local authorities to transfer their powers to iwi authorities. However, these provisions have never been used anywhere in New Zealand. We see little prospect of iwi ever becoming heritage protection authorities, especially while the crucial aspect of compensation for affected property owners is ignored.

It seems clear, too, that councils are finding it very difficult to contemplate sharing any of their powers, let alone transferring them completely. In effect, therefore, these provisions are at present dead letters. None of the other mechanisms in the current legislative regime provide for Māori to regain authority over their wāhi tapu.

311. H Rennie, J Thomson and T Tutua-Nathan, *Factors Facilitating and Inhibiting Section 33 Transfers to Iwi* (Hamilton: Department of Geography, University of Waikato, 2000), pp 45–46

312. Waitangi Tribunal, *The Te Roroa Report 1992*, p 254

313. Allen, p 18

Māori must also be able to protect their taonga tūturu themselves. It is clear that, prior to the passing of the Protected Objects Amendment Act 2006, they were largely unable to do so, since very few taonga were restored to Māori ownership. Like the Hauraki Tribunal, we are satisfied that in the first instance Crown ownership of taonga is suitable, provided mechanisms for identifying the true owners, and transferring ownership and possession to them are effective and efficient. We are not able to determine whether the new Act will meet these criteria, but we remind the Crown that these processes will need active commitment and resources.

With respect to all other forms of taonga of cultural heritage, we find that the Crown is not adequately providing for Māori to exercise rangatiratanga and act as kaitiaki. The Crown's current legislative regimes are in breach of the Treaty principle of partnership and its duty of active protection.

Tauranga Māori face ongoing prejudice through these breaches of the Treaty, as development continues to engulf their ancestral landscapes, destroying or degrading many of their significant sites of cultural heritage. The inability to act as kaitiaki over their heritage lessens the mana of Tauranga Māori, and endangers their cultural identity.

#### **8.5.4 Does the current legislative regime now adequately protect Māori cultural heritage?**

Crown legislation regarding cultural heritage significant to Māori has two major components: the management and assessment of information about places of significance, and the provisions for their protection.<sup>314</sup> The 2006 *Hauraki Report* accepted that, together, the Resource Management and Historic Places Act now provide 'avenues for full protection of sites, as long as the processes set out by legislation are well publicised and adequately funded'.<sup>315</sup> We acknowledge that, in theory, these laws can now provide substantial protections for Māori cultural heritage. However, we have significant concerns over how the legislative regime has functioned, and continues to function, in Tauranga.

##### **(1) Concerns regarding the identification of cultural heritage**

Our principal concerns regarding the identification of cultural heritage, and the management and assessment of information, include:

- ▶ poor integration and coordination of information;
- ▶ inappropriate or poor-quality information; and
- ▶ variable criteria for assessing significance.

The starting point for providing statutory protection for cultural heritage is comprehensive, clear, and readily available information about what needs to be protected. Only the

<sup>314</sup>. Parliamentary Commissioner for the Environment, *Historic and Cultural Heritage Management in New Zealand*, p 56

<sup>315</sup>. Waitangi Tribunal, *The Hauraki Report*, vol 3, p 954

tangata whenua of Tauranga Moana can identify which aspects of the landscape are significant to them as cultural heritage. If the Crown and local authorities are to help protect their ancestral landscape on public and private land, Māori must be willing and able to inform authorities of their values. In the words of the Hauraki Tribunal, 'legislative protections require the participation of Maori to be truly effective, and we think this is appropriate in a Treaty relationship where both sides have duties and privileges'. The Hauraki Tribunal stressed that it is critical that 'Maori determine which specific sites they wish to be identified as wahi tapu, and which require full protection, and then make full use of available legislative provisions'.<sup>316</sup> They noted that the nature of ownership of the land determined how specific Māori would need to be in identifying sites of significance.<sup>317</sup>

Local authorities, and the trust, for their part, have a responsibility to assist tangata whenua to provide the sort of information that is needed for planning purposes. Developing satisfactory heritage inventories requires well-resourced heritage identification projects or programmes.<sup>318</sup> Local authorities routinely employ experts to identify places of ecological or landscape significance; they should not hesitate to engage Māori on similar terms.

Local authorities must also ensure that the information Māori provide about what they regard as worthy of protection is treated with respect. In particular, there is no room for local authorities to second-guess the significance of what Māori choose to share of their history and values. Local authorities also have a responsibility to protect the sensitivity of this information. Where Māori wish any information to remain confidential, nothing should be made public unless absolutely essential to continued protection.

We see no insoluble difficulty in reconciling the need for confidentiality and protection, though this will inevitably require tangata whenua and local authorities to trust one another to act reasonably and in good faith. In commercial transactions, for example, protection of private interests does not require full public disclosure. A range of mechanisms are available to safeguard information about sensitive sites such as wāhi tapu. Māori might for example retain this information on their iwi management plans, which the local authority must take into account, rather than have the site listed in the district plan. If sites must be included in the district plan, they can be listed as 'silent files', or with loose descriptions of site location.<sup>319</sup> We note that Environment Bay of Plenty encourages local authorities to liaise in developing and implementing such a system. We think it already long overdue.<sup>320</sup>

We were concerned about the quantity, quality, and lack of coordination and integration of the information that statutory agencies held at the time of our hearings. Information on

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316. Ibid

317. Ibid, pp 955–956

318. Document T18, p 67

319. Parliamentary Commissioner for the Environment, *Historic and Cultural Heritage Management in New Zealand*, p 59

320. Environment Bay of Plenty, 'Bay of Plenty Regional Policy Statement incorporating approved Change No 1', 26 June 2008, p 181

sites that Tauranga Māori might value was scattered across a variety of lists, or registers, that were held by a variety of agencies. The Historic Places Trust maintains the site recording scheme for archaeological sites, and a register of historic places. The three local authorities' plans contained lists of heritage items. A variety of iwi management plans (held by one or more of the local authorities as more-or-less official documents) contained lists of significant places and areas, as well as discussions on how and why tangata whenua value them. There is evidently considerable potential for confusion over which lists contain which places, who holds which lists, and what protections this affords them.

The Historic Places Trust's register is intended to inform the public about historic places, notify land owners of their existence, and assist these places to be protected under the Resource Management Act.<sup>321</sup> All places are deemed to be either category I (special or outstanding significance or value) or category II (simply of significance or value). To fulfil its statutory function it must be comprehensive, and regularly updated.

At the time of our hearings in 2006, the register held very poor information about the cultural heritage of Tauranga Māori. This is partly a matter of Tauranga Māori not supplying information. Most obviously, only four wāhi tapu areas (and no wāhi tapu) had been registered.<sup>322</sup> This suggests either that Tauranga Māori do not know of this protection mechanism, do not regard it as effective, or distrust having to divulge locations.

In total the register contained only some 90 sites that might be significant to Tauranga Māori.<sup>323</sup> All were category II sites transferred from a list maintained under the 1980 legislation. Almost all items on the register were archaeological sites, comprising 20 pā and 70 middens. This is but a tiny fraction of the areas archaeological record: over 300 pā are recorded in our inquiry area; there are several thousand middens.<sup>324</sup> In short, the information is dated, and of dubious quality, and does little to reflect the importance of the region's cultural heritage.

This evidence confirms for Tauranga what several national reviews of heritage protection in New Zealand have concluded: the Historic Places Register has numerous constraints, including imbalances in the types of entries, variable information, blanket designation of all archaeological sites as category II, and low numbers of new registrations.<sup>325</sup> A review in 2004 found that the trust still lacked the necessary resources to properly maintain the register, which has clearly not fulfilled its statutory purposes in Tauranga.<sup>326</sup> This assessment has

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321. Historic Places Act 1993, s 22(2)

322. Document T24, pp 26–27

323. Ibid, p 28

324. Ibid, p 36

325. Parliamentary Commissioner for the Environment, *Historic and Cultural Heritage Management in New Zealand*, p 50

326. Peter Skelton, 'Identifying our Heritage: A Review of Registration Procedures under the Historic Places Act 1993', Historic Places Trust, 2004, p 4

been confirmed by Richard McGovern Wilson, who conceded to us that the register was not representative, owing to a lack of resources.<sup>327</sup>

Local authorities' district plans provide the primary protection to cultural heritage. They have the sole power to choose which sites are acknowledged as significant in district plans, and on what basis. For this reason, their registers, too, must be comprehensive. They must accurately represent the scope of Māori cultural heritage and reflect the values that underpin that heritage. In Tauranga, the local authorities' district plans all provide a list of heritage items significant to Māori. Desmond Kahotea identified 40 pā, six cultural landscape features, and 11 urupā from within the Tauranga inquiry district in the 2002 Western Bay of Plenty district plan; the Tauranga District Council heritage register of 2003 contained 11 pā, 18 cultural sites or landscape features, and 11 urupā.<sup>328</sup>

Given the dearth of registration in many other district plans, this is actually a comparatively good level of Māori heritage recording. The Historic Places Trust's latest research suggests that 34 of 75 district plans still contain no listed places and areas of significance to Māori at all, while several other plans list only very few places.<sup>329</sup> Though we do not have precise figures, it is also clear that both councils have improved their heritage listings in their most recent plans. Yet the fact remains that much of the heritage of Tauranga Māori is still invisible in the local authorities' district plans.

The failure to provide any protection for Kopukairoa in the western Bay of Plenty district plan illustrates many of our concerns about how information is handled under the current regime. Kopukairoa was listed as a significant site in iwi management plans, registered as a wāhi tapu site with the Historic Places Trust, and protection was sought for it in planning documents as a heritage site, and landscape feature. None of these efforts succeeded, and Kopukairoa has no status whatsoever in the western Bay of Plenty district plan. Yet, the chief executive of Western Bay of Plenty District Council, Glenn Snelgrove, acknowledged to us that only Māori can determine their relationships with their ancestral lands, waters, sites, wāhi tapu, and other taonga.<sup>330</sup> He also stressed that "The only way to avoid a repeat of such situations in the future is for both parties to work together to ensure that all significant heritage features are properly identified and given appropriate recognition in the plan."<sup>331</sup>

We agree. We would add that this case highlights the need for the trust and councils to work with Māori, in partnership, to protect what is crucial to Māori.

For this very reason, we are concerned that Western Bay of Plenty District Council has continued to ignore what Ngā Pōtiki and Ngāti Pūkenga have told them about the importance of Kopukairoa, insisting that no heritage features would be registered without the

327. Transcript 4.6, p 89

328. Document T18, pp 24–27

329. Robert McClean, *National Assessment of District Plan Heritage Provisions*, pp 32–33

330. Document T4, p 5

331. Ibid, p 18



landowners' consent. The Historic Places Trust has argued against landowners having such a power.<sup>332</sup> We are pleased that Western Bay of Plenty District Council proposes to abandon this policy in their latest plan.<sup>333</sup> However, the lack of consistency in how local authorities select which sites will be protected by their district plan demonstrates the need for much more explicit guidance from the Crown for local authorities. This is an area where the lack of policy guidance from the Crown has clearly failed to ensure local authorities act in accordance with the principles of the Treaty.

The case of Kopukairoa highlighted the lack of a positive obligation on local authorities to accept the recommendations of the Historic Places Trust. Western Bay of Plenty District Council's refusal to incorporate Kopukairoa in its planning ignored not only the trust's registration of the site as a wāhi tapu area, but repeated pleas from the tangata whenua that their values be recognised and acknowledged.

In sum, this highly publicised case has revealed the relative impotence of the provisions of the Historic Places Act, and of iwi management plans, when not properly linked to district plans. It highlights the need for effective integration of the Historic Places Act and Resource Management Act, rather than a reliance on the policies and practices of various agencies. In particular, it is clear there is a need for better integration between the historic places register and registers of sites and places on district plans. This might most simply involve an automatic transfer of all historic places listed in the register to district plans. Places of significance identified in iwi management plans might also be automatically transferred to district plans.

Integrating the views of tangata whenua into planning remains a primary problem. We heard from a range of witnesses that Tauranga Māori have had difficulty providing adequate information to local authorities, both for compiling registers of significant sites, and for participating in resource consent processes. Hapū and whānau typically hold this information – sometimes known only by a few knowledgeable kaumātua. Desmond Kahotea stressed the need for local authorities to fund the development of heritage inventories, using heritage professionals, to support the tangata whenua in identifying their heritage. He argued the lack of such strategies had led, for example, to a fragmented and belated response from hapū to the Western Bay of Plenty District Council's plan.<sup>334</sup> He and Antoine Coffin each criticised the Western Bay of Plenty District Council's 'passive' and 'unfocused' engagement with tangata whenua over identifying and protecting their cultural heritage.<sup>335</sup> And, as discussed in the previous chapter, he and several others at our hearings called for the development of dedicated resource management units to lift from hapū and whānau the burden of

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332. McClean, *National Assessment of District Plan Heritage Provisions*, pp 23–24

333. Western Bay of Plenty District Council, 'Section 32 Report for the Heritage Section of the District Plan', November 2008, p 5

334. Document T18, p 23

335. Antoine Coffin, 'A Study of Environmental Planning in Tauranga since 1991' (commissioned research report, Wellington: Waitangi Tribunal, 2006) (doc S7), p 16; doc T18, pp 23–24

largely volunteer labour in participating in resource consent processes. We also recall the evidence of witnesses such as Hinenui Cooper, discussed in section 7.6.2(3), about the sheer volume of this work.

The claimants before us invariably described their relationship with the environment in holistic terms. The wider ancestral landscape was generally seen as the unique context within which any one particular site gained its cultural meaning and spiritual significance. Witnesses spoke of how local authorities did not understand, and often dismissed, the spiritual relationship between tangata whenua and their environment, and criticised councils for seeing only particular sites as significant. Rehua Smallman, for example, told us that ‘the councils are not dealing with the environment in a holistic fashion rather they tend to focus on the physical environment and have less regard [for] the spiritual environment.’<sup>336</sup> Frank Harawira argued that authorities had no plan to preserve ‘the overall heritage of an area.’<sup>337</sup>

Claimant concern over a lack of overall appreciation of the cultural landscape and of strategic planning around cultural heritage was echoed by Desmond Kahotea and Antoine Coffin. Desmond Kahotea noted at the stage 1 hearings in 1999, for example, that no heritage areas had been acknowledged or identified in the Tauranga District Council district plan, and no heritage management strategy developed for the coastal area most threatened by the ongoing surge in Tauranga’s development.<sup>338</sup> In 2006, at our stage 2 hearings, he again reiterated that the local authorities’ plans only extend heritage features to cover larger areas where they happen to coincide with conservation or landscape areas. There remained no recognition of an ancestral, cultural, or heritage landscape area.<sup>339</sup> Antoine Coffin similarly stressed that ‘[t]here is still no integrated management strategy and comprehensive and accurate inventory of Maori heritage.’<sup>340</sup> The need for such strategies is particularly acute in Tauranga, because, as archaeologist Harry Allen has stressed, ‘[d]ecision making on a one-off basis has proved to be especially flawed where impacts on historic places come as the result of systematic or cumulative processes, such as urban growth.’<sup>341</sup>

Desmond Kahotea suggested Rangataua as the prime example of an area that should be explicitly recognised in the Tauranga City Council plan as an ancestral heritage area. This landscape is celebrated in pēpeha, whakataukī, kōrero, and waiata. As map 8.3 (over) reveals, it is dense with archaeological and traditional evidence of ancestral occupation, including pā, marae, kāinga, battle sites, urupā, terraces, and middens. The estuary itself is one large mahinga kai.<sup>342</sup> Attempting to separate out individual sites as the significant parts of this ancestral landscape distorts the meanings it has for tangata whenua.

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336. Document R43, p 8

337. Frank Te Werahiko Harawira, brief of evidence, 5 July 2006 (doc R66), p 11

338. Document E18, p 24

339. Document T18, p 20; Desmond Tatana Kahotea, brief of evidence, undated (doc T22), p 5

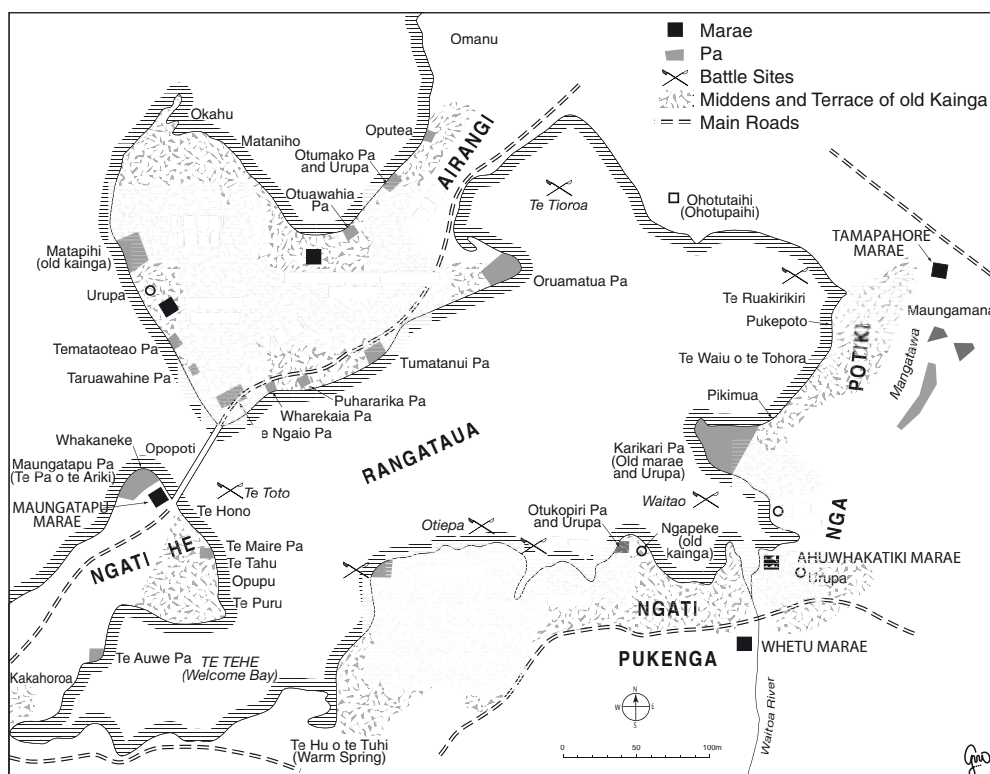
340. Document S7, p 52

341. Allen, p 38

342. Document T18, pp 29–31; Kahotea, ‘Tangata Whenua Literature Review’, pt 1, p 2

8.5.4(1)

## TAURANGA MOANA, 1886–2006



Map 8.3: The ancestral landscape of Rangataua

We regard the development of heritage strategies by the local authorities as essential to effective district planning, especially in areas such as Rangataua which are being placed under increasing pressure by the growth of Tauranga. A key part of these strategies must be to explore how to help tangata whenua to move beyond fighting for protection for each and every one of their significant sites. By determining which parts of their ancestral landscape contain concentrations of their most significant sites, tangata whenua can work with local authorities and the trust to afford some protection to broader parts of their ancestral landscapes. We concur with the finding of the Environment Court that focusing on sites does not afford the appropriate protection to wider landscapes. Where there is evidence of large and complex associations the court has suggested adopting the concept of a 'heritage area of significance to Māori' within planning documents.<sup>343</sup>

We agree with this suggestion, and envisage that this might enable protections to be offered to the most significant areas of Māori ancestral landscape similar to those available to outstanding natural landscapes. We would hope that ongoing development in such

343. *Harrison v Whangarei District Council* unreported, 30 March 2005, Environment Court, w034/05, paras 30–31, 35; Robert McClean, *Sustainable Management of Historic Heritage Guidelines*, p36



Figure 8.4: Rangataua Estuary, looking towards the sea

Photograph by Whites Aviation. Reproduced courtesy of the Whites Aviation Collection, Alexander Turnbull Library (WA-27647).

heritage areas would therefore have to be sympathetic to, and not destructive of, the values tangata whenua ascribe to them.

We acknowledge that the local authorities are increasingly aware of the difficulties and issues that have resulted from unrepresentative and poorly integrated information about Māori cultural heritage. We note that, under the SmartGrowth strategy, it is intended to develop a subregional cultural heritage strategy to better manage information and protect cultural heritage. The strategy contemplates: identifying which areas are likely to be subject to future development; surveying these areas for archaeological and cultural heritage values; developing an integrated subregional database incorporating currently scattered information; and investigating establishing a heritage forum including planners, practitioners, and kaitiaki for the integrated management and sharing of information.<sup>344</sup>

We applaud the intention to develop such a strategy. But, as noted in chapter 7, progress on these SmartGrowth actions has been very slow, and there is to date little evidence of the concrete action and targeted funding that is needed to protect the cultural heritage of Tauranga Māori. Given the ongoing destruction of their heritage, in and around the

344. SmartGrowth, 'SmartGrowth Implementation Monitoring Report (includes all SmartGrowth Specific Project Actions) For Period 1 October 2008– 31 January 2009', s7.1.10

Tauranga region, we suggest this must become a priority for local authorities, working in partnership with tangata whenua and the Crown.

**(2) Concerns regarding the protection of cultural heritage**

We also have significant concerns about the adequacy of the Crown's legislative regime for protecting places and sites that have been identified as significant. These concerns all stem from the fact that Tauranga Māori are still being forced to bear witness to the ongoing destruction of their cultural heritage. Māori traditionally kept their taonga tuturu hidden, often vesting them in the care of the earth, Papatūānuku. But Tauranga's landscape is being rapidly transformed, and Papatūānuku can no longer keep their taonga safe. As Antoine Coffin acknowledged, it is quite clear that in practice the Resource Management Act has to date failed to fulfil the expectations of tangata whenua in Tauranga that it would allow their cultural heritage to be protected; instead, they have suffered consistent continued losses of their cultural heritage.<sup>345</sup> We are also deeply concerned at their sense that this treatment is discriminatory, since they believe that destruction of Pākehā heritage would not be permitted to the same degree. Lance Waaka argued:

We keep losing our waahi tapu and urupa. If someone bulldozed down the Mission House in Tauranga, they'd be jailed. But because our old pa, urupa and waahi tapu sites are hidden from sight, it seems to make them less important. That's not right.<sup>346</sup>

Our concerns about the ongoing destruction of cultural heritage that has occurred under the current legislative regime include:

- ▶ The lack of integration of the current legislative regime. Effective integration relies on the policies and practices of institutions with little direction from the Crown.
- ▶ Delegation of Crown power to local authorities without corresponding delegation of Treaty obligations.
- ▶ Lower standards of protection for Māori cultural heritage than for archaeological sites or historic buildings in district plans.<sup>347</sup>
- ▶ The inherent powerlessness of the Historic Places Trust under current legislation to protect cultural heritage.
- ▶ The trust's lack of resources.
- ▶ Lack of tangata whenua participation in the trust processes for issuing authorities to destroy archaeological sites.
- ▶ Low penalties for destroying archaeological sites.

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345. Antoine Coffin, under cross-examination by claimant counsel Karen Feint, stage 2, fourth hearing, 30 October 2006, recording 4.3.24, at 62 mins

346. Lance Hori Waaka, brief of evidence, 25 September 2006 (doc s23), p 8

347. Robert McClean, *National Assessment of District Plan Heritage Provisions*, pp 48–50



The Historic Places Trust and the local authorities are the key agencies for protecting cultural heritage, operating under the Historic Places Act and Resource Management Act respectively. Despite its expertise, the trust is not empowered by current legislation to protect cultural heritage on its own. The primary protection is instead provided by local authorities.

This structure requires very clearly defined statutory links between the Historic Places Act and the Resource Management Act. However, statutory links are not well defined at all. Integration of the Acts depends on the policies and practices the institutions concerned choose to adopt. The Crown has failed to give clear policy advice as to what these policies and practices should be. It has failed to provide a national strategy or national policy statement for cultural heritage, despite this being recommended by several key reviews of the heritage management regime.<sup>348</sup> Unsurprisingly, local authorities have proven extremely variable in their commitment to protecting cultural heritage in general, and Māori cultural heritage in particular.

It is well established that the Crown may not transfer its powers without ensuring that its Treaty responsibilities are also met. In this case, however, the Crown has provided local authorities with the primary mechanism used to protect cultural heritage, but has not ensured that local authorities are bound to give effect to the principles of the Treaty in preparing their plans.

The Crown cannot continue merely to rely on the goodwill of local authorities to protect the taonga of Tauranga Māori. This stance cannot be consistent with the Treaty principles of partnership and active protection, given that the local authorities of Tauranga do not regard themselves as Treaty partners, and do not believe the principles of the Treaty apply to them in the same manner or extent as to the Crown.<sup>349</sup>

In the Tauranga region the local authority plans do contain objectives and policies that refer to the especial need to protect Māori heritage. The Western Bay of Plenty District Council plan acknowledges, for example that it is a significant issue that:

The current lack of knowledge and understanding of Maori culture, etiquette and protocol often produces inappropriate activities in localities of significance to the iwi with the result, in many cases, that there are adverse effects which destroy or damage the heritage feature or its spirituality.<sup>350</sup>

Despite this acknowledgement that Māori heritage is particularly threatened by a lack of public awareness, however, the council's plan does not provide the level of protection to cultural heritage, and Māori heritage in particular, that is seen as necessary by the trust. The

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348. Parliamentary Commissioner for the Environment, *Historic and Cultural Heritage Management in New Zealand*, pp 91, 93; Department of Conservation, *Historic Heritage Management Review: Report of the Ministerial Advisory Committee* (Wellington: Department of Conservation, 1998), pp 15, 29–30

349. Document U39, pp 2–3

350. Western Bay of Plenty District Council, 'Western Bay of Plenty District Plan', 29 August 2009, s 11.1.4



trust's standards to guide local authorities in making rules for the protection of Māori heritage sites are as follows:

**NZHPT Standard**

- ▶ Disturbance of listed historic sites is a discretionary activity, or for higher ranked items – non-complying.
- ▶ Damage and destruction of listed historic sites is a non-complying or prohibited activity.
- ▶ Disturbance of a place and area of significance to Māori is a non-complying activity.
- ▶ Destruction of a place or area of significance to Māori is a non-complying or prohibited activity.<sup>351</sup>

The Western Bay of Plenty District Council's current rules for heritage all refer to either permitted or discretionary activities (the proposed plan introduces controlled activities for buildings). Similarly, the Tauranga City Council allows damage and destruction of all listed sites as a limited discretionary activity. Only activities affecting buildings are controlled activities.<sup>352</sup>

The situation in Tauranga therefore mirrors that noted by the trust for New Zealand as a whole:

there is an overall lower standard of regulation across the nation for historic sites and places and areas of significance to Maori in comparison with listed historic buildings . . . This situation is clearly unacceptable from the view of the NZHPT. There is no reason why listed historic sites and places and areas of significance to Maori should not have regulatory provisions comparable to listed heritage buildings. In fact, the principles of the Treaty of Waitangi promote adequate and equivalent protection for Maori heritage.<sup>353</sup>

Though the Historic Places Trust has the statutory role of protecting New Zealand's heritage, and is tasked with giving effect to the principles of the Treaty, it lacks both the powers and the resources to do so. It cannot ensure that local authorities give effect to the principles of the Treaty and properly protect Māori heritage.

We acknowledge that the trust is now doing what it can in Tauranga despite very limited resources. The trust now takes a much more proactive role to try and protect archaeological sites in Tauranga. Since 1999, the trust has operated one of its six area offices from Tauranga. The trust now conducts significantly more compliance monitoring, and consultation with tangata whenua and developers.

351. Robert McClean, *Sustainable Management of Historic Heritage Guidelines*, pp 32, 36

352. Tauranga City Council, 'Tauranga District Plan, Chapter 16: Heritage Rules', Tauranga City Council, <http://content.tauranga.govt.nz/districtplan/cd/files/Chapter16.pdf> (accessed 15 February 2010), p 3

353. Robert McClean, *National Assessment of District Plan Heritage Provisions*, p 49

Yet the fact remains that, despite funding increases over the several years prior to our hearings, the trust is still clearly inadequately resourced. Richard McGovern-Wilson, the trust's senior archaeologist, noted an overall lack of funding, and noted in particular a lack of needed staff, and the small number of places that the trust is able to register each year.<sup>354</sup> He acknowledged that over the long term it was a 'fair assumption' that the direct result of this continued under-resourcing is the ongoing destruction of the archaeological heritage of the region.<sup>355</sup>

At the time of our hearing it was apparent that this under-resourcing had contributed to the fact that relationships between tangata whenua, local authorities, and Crown entities were badly damaged. The trust was the subject of substantial claimant criticism. Witnesses cited, in particular, the large number of sites destroyed, even under the current legislation; their lack of participation in the decisions to allow destruction of their heritage; disregard for Māori values; poor quality archaeological assessments; and lack of oversight of developers by the trust. Several witnesses told us that they had lost all confidence in the ability of the trust to help protect heritage.<sup>356</sup>

The trust has seldom declined any of the many applications to modify or destroy any Māori cultural heritage sites in Tauranga. The trust declined no applications prior to 1999, and only five of approximately 250 applications since. According to Richard McGovern-Wilson, most authorities (122 of the last 138, for example) were granted in accordance with the wishes of tangata whenua.<sup>357</sup> He also stressed the proactive role the trust now takes in attempting to reconcile the wishes of tangata whenua and developers. However, given this, we remain most concerned that the trust is still granting numbers of authorities over and against the express wishes of the tangata whenua.

Claimants argued that the trust's practice of accepting destruction of their heritage, provided that information about it was recorded, disregarded their knowledge and values. Discussing the fate of Hikutawatawa Pā, Hinenui Cooper remarked: 'Preserving our Pa in a 50 page book is not my ideal but evidently, the Historic Places Trust and the Environment Court, thinks this methodology is ok.'<sup>358</sup> Richard McGovern-Wilson acknowledged that 'the Trust . . . accepts as a poor second that the recovery of information to replace the loss of in situ material is happening.'<sup>359</sup>

This stress on information recovery is enshrined by the Historic Places Act's emphasis on archaeology. As noted by the Parliamentary Commissioner for the Environment in 1996:

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354. Transcript 4.6, pp 85, 89, 105

355. Ibid, p 85

356. Document s23, pp 7–8; Robyn Hinenui Cooper, brief of evidence, 26 June 2006 (doc R28), pp 19–21

357. Document T24, p 18

358. Document R28, p 21

359. Transcript 4.6, p 86

The legal concept of the archaeological site is based on the information contained in that site and the focus of the authority process is on ensuring that archaeological information is obtained before a site is destroyed or altered . . .<sup>360</sup>

Yet, we have seen that, despite the statutory premium on accurate and comprehensive archaeological information, authorities to destroy archaeological sites in Tauranga were routinely granted during the 1990s on the basis of very poor archaeological assessments, and monitoring, with very little input from tangata whenua, which provided a very shallow, and (as it proved) inaccurate understanding.<sup>361</sup>

We are particularly concerned at the implications of the fact that people with no formal training or qualifications in archaeology whatsoever oversaw the development of several of the first large subdivisions at Pāpāmoa.<sup>362</sup> Despite the extreme sensitivity of this work, often involving the unearthing of the ancestral heritage of Māori, and indeed the ancestral remains of Māori, it seems anyone can claim to be a practising consultant archaeologist. This extraordinary scenario is possible because there is still no professional body overseeing the practice of archaeology in New Zealand.

We have grave concerns regarding oversight of the information provided when developers apply to destroy cultural heritage. The onus is on developers to provide the relevant information to the Historic Places Trust; they provide archaeological assessments, and state what consultation has taken place with tangata whenua, and if it has not, explain why. The trust itself does not necessarily talk to tangata whenua at all. Nor is there any provision for notification or public submission on applications to destroy sites (though the Māori Heritage Council may undertake consultation regarding wāhi tapu). We heard of instances where developers consulted with only one or two individuals from a hapū,<sup>363</sup> and an instance, in the Lynley Park subdivision, where developers suppressed archaeological reports not to their liking.<sup>364</sup> It is inappropriate for the process that allows developers to destroy cultural heritage to so heavily rely on the integrity of the developers, and to exclude the public, tangata whenua in particular.<sup>365</sup>

In 1996 the Parliamentary Commissioner for the Environment called for the Crown to institute ‘a modern consent process for archaeological sites’ that prioritised Māori cultural heritage values above archaeological values, and included ‘appropriate consultation, involvement of tangata whenua, local decision making, site visits, independent assessments,

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360. Parliamentary Commissioner for the Environment, *Historic and Cultural Heritage Management in New Zealand*, p 63

361. Document T27, p 45; doc T24, p 21

362. Document E18, p 17; Desmond Tatana Kahotea to Craig Batchelar, manager planning, Tauranga District Council, 21 August 1995 (doc T18(a))

363. Document T18, p 46

364. Transcript 4.6, p 93

365. Ibid, p 81

monitoring, and enforcement.<sup>366</sup> While the greater engagement by regional archaeologists since the late 1990s has gone some way towards meeting this call in Tauranga, there is still neither sufficient involvement of the tangata whenua, nor priority accorded to their values.

In considering applications to destroy sites, the trust must accord equal weight to Māori cultural and archaeological values, and therefore make every effort to elicit what those values may be.<sup>367</sup> Yet it is clear that equal effort has not been put into ascertaining Māori values in Tauranga. Archaeologists on the trust are currently not well equipped to ascertain Māori values. Even more worrying, archaeological training in New Zealand does not include any requirement that students develop any understanding of Māori and their relationships to their heritage, despite the fact that these are the vast majority of the archaeological sites in New Zealand.

While Māori heritage advisers (pouarahi) have been employed in each of the trust's regional offices since 2000, in Tauranga this work remains significantly under-funded. Richard McGovern-Wilson told us that archaeologists and (in particular) pouarahi are significantly overworked in Tauranga. He suggested the trust's optimum staffing levels at Tauranga would be three archaeologists and three pouarahi. Yet, at the time of our hearing, there was the equivalent of one and a half full-time archaeologists, but just over half of one pouarahi.<sup>368</sup>

The consequence of the emphasis on archaeology, and the neglect of Māori knowledge, has been that the authorities overseeing development at Pāpāmoa were ignorant of traditional knowledge about ancestral occupation in the area for far too long during the 1990s. Much of the cultural landscape was lost in that time.

We view too with some disquiet the prospects for the cultural heritage of tangata whenua as development at Pāpāmoa continues. It is greatly concerning, for instance, that a hapū such as Ngā Pōtiki, which has so much at stake in the future of the Pāpāmoa area, has become so disillusioned that they no longer consult with either applicants or statutory bodies.<sup>369</sup> Equally concerning is the fact that local authorities have disregarded the trust's belated call for greater protection of cultural heritage in areas zoned for 'greenfields' development in Pāpāmoa.<sup>370</sup>

This reluctance to commit to the protection of cultural heritage in Pāpāmoa is symptomatic, we believe, of a wider malaise. David Derby of the trust has noted that the topic of 'sustainable management of Maori values versus private property rights' has been 'too

366. Parliamentary Commissioner for the Environment, *Historic and Cultural Heritage Management in New Zealand*, p 85

367. We note that Ngā Pōtiki stressed this issue in a presentation to the Ministry of Culture and Heritage in 2000. Ngā Pōtiki Resource Management Unit, 'Heritage Issues for Ngāpotiki: Presentation to Ministry of Culture and Heritage', November 2000 (doc T18(a))

368. Transcript 4.6, pp 103–104

369. Document R28, pp 13–14; doc T24, p 38

370. Document T24, p 21

controversial for central and local government.<sup>371</sup> Yet it is one matter that local authorities in Tauranga (and beyond) have been reluctant to impose rules that might be seen to constrain property rights. It is quite another matter that they have also been very slow to provide any of the range of possible incentives available under legislation, such as the Resource Management Act, to encourage landowners to consider protecting heritage values. The Tauranga City Council district plan, for example, acknowledges that the district is experiencing rapid growth, resulting in ‘ancestral landscapes and sites (wāhi tupuna) being destroyed or their value compromised, and is placing pressure on those sites which remain.’<sup>372</sup> But, other than the weak regulations described earlier, its methods to address this situation do not provide any incentives to landowners to protect heritage beyond a commitment to ‘encourage’ them to protect wāhi tapu and other sites through providing information and suggestions for management.<sup>373</sup> Significantly, the Crown has been very slow to provide policy leadership in this area.

In such a situation, where the trust has insufficient legislative powers and resources to protect historic places and wāhi tapu, and where local authorities lack the will to do so, or even to help landowners to do so, it seems all too likely that disputes will continue to be decided before the Environment Court.<sup>374</sup> As we have seen, Māori have struggled to see that justice is being done to their cultural heritage in this forum.

We acknowledge that the Environment Court has had some very difficult decisions to make in the cases concerning Pāpāmoa. We do not wish to relitigate the substantive issues. But we understand how the claimants might find it difficult to see how justice could be done to them in a situation where the beliefs of their elders as to the nature and extent of tapu in their ancestral landscapes were challenged in highly adversarial circumstances. The claimants’ experiences here highlight once more the disparity between the legal protections afforded archaeological sites compared to those provided to wāhi tapu.

In sum, therefore, the Historic Places Trust bears some responsibility for failing to stem the spate of rapid development in the early 1990s at Tauranga, particularly at Pāpāmoa, that occurred without proper regard for cultural heritage. The trust was simply too slow to exert adequate controls over a process predicated on grossly inadequate information, gathered by unqualified people, employed by developers whose interests did not lie with protecting Māori heritage. The trust’s lack of knowledge cannot excuse the careless and destructive nature of early development at Pāpāmoa, since it was the trust itself that failed in its statutory duty to ensure adequate information was gathered.

Yet, even if the trust had exerted all the controls available to it, it is doubtful whether the range of sites significant to Māori would have been protected. The maximum penalties of

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371. David Derby, ‘Background Paper’, p 3

372. Tauranga City Council, ‘Tauranga District Plan, Chapter 5: Heritage’, Tauranga City Council, <http://content.tauranga.govt.nz/districtplan/cd/files/Chapter5.pdf> (accessed 29 March 2010), p 1

373. Ibid, p 3

374. Document T24, p 21

\$40,000 imposed under the Historic Places Act are quite insufficient to deter unscrupulous developers from breaking the law. Richard McGovern-Wilson confirmed to us that not only are these fines much lower than in New South Wales, for example, where developers may be fined \$1.2 million, but that the courts in New Zealand have been imposing fines that were ‘a drop in the ocean’ to developers.<sup>375</sup>

This underlines the fact that the key reason underlying all the destruction of heritage that has occurred in Tauranga, and continues to occur in areas such as Pāpāmoa, is that the local authorities are not required to make adequate provision in their district plans for protecting the taonga of Tauranga Moana.<sup>376</sup> This omission is the direct responsibility of the Crown.

### (3) *Treaty analysis and findings*

The current legislative regime is not providing adequate protection to the cultural heritage of all the citizens of Tauranga Moana. The framework for protection established by the Crown’s legislative regime is distributed across a number of poorly linked Acts, resulting in scattered information about cultural heritage, and poorly integrated efforts to protect it.

Māori heritage is particularly at risk under current legislation, and nowhere more so than in Tauranga Moana, where intensive and extensive development continues to threaten a fragile and irreplaceable ancestral landscape. Māori heritage is especially threatened for a number of reasons: lack of public understanding and sympathy; weak legislative protections for specifically Māori sites; a legislative bias towards archaeology over Māori values; and weak protections for Māori sites in district plans.

Underlying all these reasons is the fact that Māori are unable to exercise rangatiratanga and kaitiakitanga, and have been reduced to the status of a lobby group trying to influence how others decide the fate of their heritage when weighed against a range of other factors. This is demonstrated most clearly by the fact that, in the overwhelming majority of cases, the Historic Places Trust grants permission for sites to be destroyed, provided information about the site is recovered. Information held in archaeological reports about ancestral places that once existed before they were dug up and destroyed cannot sustain the connections between living communities and the landscape that has shaped them. The very best that is ever achieved under this regime, regardless of the significance of the Māori values involved, is a compromise, steady attrition of ancestral landscapes, and the erosion of the social and community relationships linked to those landscapes.

The Crown has argued that it has had to strike a balance between allowing development and protecting cultural heritage. Yet the senior archaeologist of the trust, the very Crown agency responsible for striking that balance, accepted as ‘fair’ the comment that sites in

375. Transcript 4.6, pp 113–114

376. Warren Gumbley, ‘Archaeological Survey: LS Johnson Trust Property, Papāmoa’, 24 October 1997 (doc T18(a))



Tauranga were being ‘destroyed at a horrific rate’, and that the trust’s processes were quite unable to prevent this.<sup>377</sup>

The trust, who are obliged to give effect to the principles of the Treaty, simply do not have the statutory powers or resources to properly protect the cultural heritage of Tauranga Māori. Local authorities, who do have those powers, are not obliged to give effect to the principles of the Treaty, do not regard themselves as Treaty partners, and do not give equal treatment to Māori cultural heritage. The cultural heritage of Tauranga continues to slide into this legislative abyss.

We find that the Crown’s failure to provide a legislative regime that provides adequate protection for Māori cultural heritage is a breach of the duty of active protection. The failure to provide a legislative regime that guarantees equal protection to Māori and Pākehā heritage is a breach of article 3, and of the principle of equity. Both Pākehā and Māori were to mutually benefit from the Treaty; but the ability of Tauranga to protect their taonga has been undermined, and the Crown has failed to offer the protections Māori can no longer provide for themselves. In this respect, the Crown is also in breach of the principle of mutual benefit. The Tribunal has already found that the Crown breached the principles of the Treaty in seizing Tauranga lands, and instituting the Native Land Court, through which Tauranga Māori lost more land. This left Māori themselves unable to protect their own wāhi tapu and other taonga on this land. Because it was directly responsible for this situation, the Crown has an added responsibility to rectify it and provide redress, which it has failed to meet.

#### 8.6 MAIN CONCLUSIONS AND FINDINGS IN THIS CHAPTER

Our main conclusions and finding are as follows:

- ▶ The Treaty protects the rights of Tauranga Māori to exercise rangatiratanga, that is authority and control, over the taonga of their cultural heritage, and to have their heritage protected.
- ▶ Throughout the period from 1886 to 1990 the Crown did not adequately provide for Tauranga Māori to exercise rangatiratanga over their cultural heritage. The Crown has thereby breached the principle of partnership and the duty of active protection.
- ▶ Throughout the period from 1886 to 1990 the Crown provided Māori heritage with less protection than Pākehā heritage. The Crown’s comparative disregard for the taonga of Māori culture was a sustained breach of the principle of equity and the duty of active protection.
- ▶ Under current legislation there is the potential for corporate bodies – such as iwi authorities, or Māori trusts or incorporations – to become heritage protection authorities,

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377. Transcript 4.6, p 113

able to issue heritage protection orders. Nationwide, only five body corporates have so far become heritage protection authorities – none of them Māori. Nor has the current legislation resulted in many power-sharing arrangements between Māori and local authorities. Without stronger support from the Crown, Tauranga Māori will not be in a position to exercise rangatiratanga and kaitiakitanga over their cultural heritage, and we find that the Crown has yet to properly meet its duty of active protection in this regard.

- ▶ Until the passing of the Protected Objects Act 2006 the Crown's provisions for Māori to claim and care for their taonga tuturu were inadequate, and in breach of the duty of active protection. We are not able to determine the extent to which the 2006 Act is resolving this issue, since it falls outside the period covered by the evidence presented to us, but we remind the Crown that these processes will need active commitment and resources.
- ▶ The current legislative regime is not providing adequate protection to the cultural heritage of Tauranga Māori, which continues to be lost at an alarming rate. The framework for protection is distributed across a number of poorly linked Acts, resulting in scattered information about cultural heritage, and poorly integrated efforts to protect it. The Crown's continuing failures are a breach of its duty of active protection and the principle of equity.



## CHAPTER 9

### SOCIOECONOMIC IMPACT

Te whenua te waiu. Whakatipua nga tamariki.

Land is the nourishment which strengthens the children of the next generation.

Whakatauki (saying)<sup>1</sup>

#### 9.1 INTRODUCTION

This chapter examines the impact of Crown policy, actions, and omissions on the socioeconomic status of claimant iwi and hapū in the Tauranga inquiry district from 1886 to 2006. Counsel for one of the claimant groups told us that ‘rather than two people[s] living in harmony and respect for each other to mutual advantage in this country’, Tauranga Māori were ‘marginalised politically, socially, culturally and economically to make way for the Crown’s development of the country’. ‘The results of colonisation here in Tauranga’, continued counsel, ‘are a long way from . . . the spirit and intention of the Treaty’.<sup>2</sup> Our task is to assess the validity of statements such as this.

As this is a broad subject encompassing many topics that have featured in previous chapters, detailed contextual and legislative background (for example, the laws and policies relating to land administration, rating, and planning) are not presented again in this chapter. The focus is rather on the economic, social, and cultural consequences for the claimant groups of two crucial phenomena – land loss, and rapid urbanisation after 1945. Both phenomena occurred against a backdrop of already enormous land losses in the years immediately after raupatu. By 1886, Tauranga Māori retained only about a quarter of the land in the inquiry district, the rest having been lost through confiscation, the Crown’s Te Puna–Katikati purchase, and the alienation of a considerable amount of the supposedly ‘reserved’ and ‘returned’ land.<sup>3</sup> As the Tribunal’s first report pointed out, much of the land

1. Evelyn Stokes, *Tauranga Moana: a Study of the Impact of Urban Growth on Rural Māori Communities*, Waitangi Tribunal Occasional Publication, 1980, no 7 (doc A15), p 73

2. Counsel for Ngāi Te Rangi, closing submissions, undated (doc U31), pp 14, 21

3. Waitangi Tribunal, *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* (Wellington: Legislation Direct, 2004), pp 366, 403

that remained was ‘of limited utility in the dominant Pakeha economy of the second half of the nineteenth century’, and was insufficient for the present and foreseeable needs of hapū.<sup>4</sup> Land continued to be lost after 1886. By the time of our inquiry, nearly 80 per cent of the land reserved or ‘returned’ had gone, leaving only a little over 13,000 hectares in 2006.<sup>5</sup>

Opportunities for Tauranga Māori to do well in the new situation they faced in 1886 did not depend entirely on possessing land. Nevertheless, land loss on the scale they had experienced – together with the breakdown of tribal ownership and rangatiratanga that ensued from title individualisation, the fragmentation of holdings, and the operation of land legislation and policies down through the years – was likely to have profound and enduring repercussions on Māori social and economic well-being. Indeed, the Crown did not deny this, acknowledging that the loss of land ‘had an influence’ on the current socioeconomic status of Māori in the Tauranga district.

Rapid urbanisation in the period following the Second World War also impacted significantly on the socioeconomic well-being of Tauranga Māori. Living mainly in rural settlements on the outskirts of the small town of Tauranga, Māori were suddenly confronted by fast-encroaching residential and commercial development. The expanding city arrived, uninvited, on their doorstep. ‘Similar processes have been in operation elsewhere’, writes Professor Stokes, ‘but in few areas have the pressures on land been so intense and involved such complete transformation of the lifestyle of Maori communities in a single generation.’<sup>6</sup> The pressures were multiple and simultaneous. Among them were numerous public works takings of Māori land for port and urban infrastructure, environmental pollution and loss of customary food resources, and skyrocketing valuations and rates arrears.

Despite the existence of some valuable statistical data, the sociocultural impacts of such pressures were in many ways unquantifiable. This in no way lessens their significance. The forces at work were interrelated and mutually reinforcing. For example, an insufficiency of land meant people had to seek supplementary waged work, which in turn made them vulnerable to downturns in the economy that could result in unemployment. This affected living conditions and could lead to sickness, precluding people from taking work even when it became available. Thus, as this chapter will show, the relationships between land and resource loss, hapū and iwi identity, cultural malaise and socioeconomic disadvantage, were complex and fluid.

The chapter is shaped around the two central themes of land loss and rapid urbanisation. It also examines and assesses the adequacy of the Crown’s response – its policies, practices, and the social services it provided to claimant iwi and hapū. Specifically, we explore the following issues:

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4. Waitangi Tribunal, *Te Raupatu o Tauranga Moana*, pp 366, 403

5. Michael Belgrave, Grant Young, Adam Heinz, and David Belgrave, ‘Tauranga Maori Land Alienation: A Quantitative Overview, 1886–2006’ (commissioned research report, Wellington: Waitangi Tribunal, 2006) (doc T16(a)), p 24

6. Document A15, p 2

- ▶ Section 9.3: How did land loss and rapid urbanisation contribute to the economic and social marginalisation of Tauranga Māori?
- ▶ Section 9.4: Have the Crown's legislative regimes for Māori landholding contributed to the marginalisation of Tauranga Māori?
- ▶ Section 9.5: Did the Crown meet its obligations to those hapū left with little or no land in Tauranga Moana?
- ▶ Section 9.6: Did the social services (health, housing, and education) provided for Tauranga Māori between 1886 and 2006 respond adequately to the relative socioeconomic deprivation of Māori? Were they culturally appropriate, and were tangata whenua sufficiently involved in creating and administering them? Did the services provided fulfil the Crown's obligations under the Treaty?

We then summarise the parties' respective arguments on these issues, before offering our own analysis and findings.

First, though, as a point of reference, we provide a snapshot of the relative socioeconomic status of Tauranga Māori at the start of the twenty-first century.

## 9.2 RELATIVE SOCIOECONOMIC STATUS OF TAURANGA MĀORI :

### A CONTEMPORARY OVERVIEW

Drawing on 2001 census data, commissioned researcher Leanne Boulton provides a broad overview of the socioeconomic situation of Tauranga Māori relative to non-Māori at the beginning of the present century.<sup>7</sup>

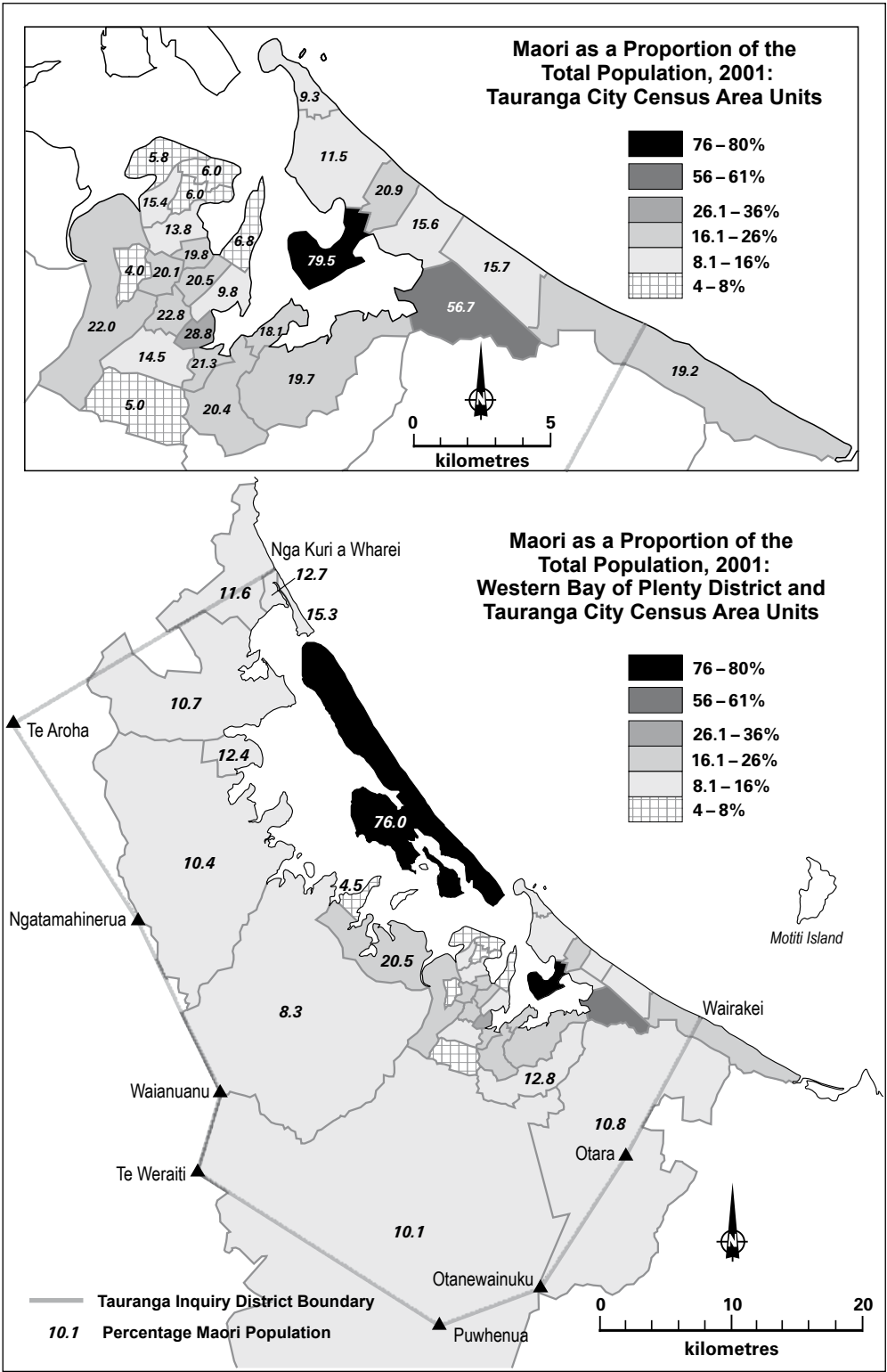
There are some limitations in this overview: it does not account for any variations between different parts of the inquiry district (unless they are very significant) and, because statistical profiling of this kind refers to a large group, it says nothing about individual members of that group. On the other hand, Boulton's study helpfully directs attention past the 'success stories' to the less satisfactory situation in which most other members of the claimant iwi and hapū find themselves.

Another proviso needs stating at the outset. Boulton studied data relating to the two local government districts within Tauranga Moana: the then Tauranga district (now called Tauranga City) and the surrounding Western Bay of Plenty district. The Tauranga district lies entirely within our inquiry district. The boundaries of the Western Bay of Plenty district, however, coincide only approximately with those of the inquiry district in the north-west, and in the east they encompass a large area (including Te Puke and Maketū) that lies outside our inquiry district. Furthermore, the latter area contains more than half the Māori population of the Western Bay of Plenty district.

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7. Leanne Boulton, 'A Socio-demographic and Economic Profile of Māori in the Tauranga Inquiry District, 2001' (commissioned research report, Wellington: Waitangi Tribunal, 2006) (doc s5)





**9.2.1 Māori population**

Both the Tauranga district and the Western Bay of Plenty district have a slightly higher proportion of Māori in their populations than does New Zealand as a whole. In the 2001 census, 14,112 people in the Tauranga district identified themselves as Māori (15.5 per cent of the total population), while the figure for the Western Bay of Plenty district was 6399 (16.7 per cent of the total population). For New Zealand as a whole the comparable figure was 14.1 per cent.<sup>8</sup> Areas with particularly high proportions of Māori were Matakana and Rangiwaea, Matapihi, and Mangatawa (see map 9.1).

Of course, not all Māori in Tauranga Moana are members of the claimant iwi and hapū. Although most census respondents living in Tauranga Moana and identifying as Māori did record affiliation to a local iwi, there were also a significant number affiliating to non-Tauranga iwi, which points to a considerable in-migration of Māori from other regions. It is clear, too, that many members of the claimant iwi and hapū are now resident in other parts of the country.<sup>9</sup> We stress that the statistics quoted in the following paragraphs refer to Māori living in Tauranga, rather than to tangata whenua (or members of the claimant iwi and hapū) specifically.

**9.2.2 Socioeconomic status**

Overall, nearly half (48.4 per cent) of all Māori in the Western Bay of Plenty district, and nearly 60 per cent of all Māori in the Tauranga district, were living in areas that were socially and economically disadvantaged or very disadvantaged.

In both districts, the affluent and most affluent areas had a low proportion of Māori residents, while the most deprived areas had a high proportion.<sup>10</sup> In the Western Bay of Plenty district, on 4.9 per cent of Māori lived in the most advantaged census area units, compared with 9.6 per cent of the total population. But 13.7 per cent of Māori lived in the the most disadvantaged census area units, compared with only 4.8 per cent of the total population. In the Tauranga district, only 0.6 per cent of Māori lived in the most advantaged census area units (compared to 2.5 per cent of the total population), but 21.1 per cent of Māori lived in the most disadvantaged census area units (compared with 13.1 per cent of the total population).

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8. Ibid pp 10–11

9. Ibid, pp 28–30, 32–33, 35–37

10. Ibid, pp 22–23, 26–27, 42–43

## TAURANGA MOANA, 1886–2006

## 9.2.3

**9.2.3 Employment**

In both districts, Māori were significantly over-represented as paid employees, but under-represented among employers and the self-employed without employees.<sup>11</sup> This might suggest that Māori were less likely than the total Tauranga population to have the capital and skills needed to own their own businesses.<sup>12</sup>

In addition, the proportion of Māori working in professional and technical occupations lagged behind the proportion of the total population, pointing to lower educational qualifications. Occupations where Māori were over-represented were plant and machinery operating, assembling, and labouring. The disparity between Māori and total population was less marked in clerical, sales, and service occupations.<sup>13</sup>

**9.2.4 Income**

Māori in Tauranga Moana were markedly over-represented in the very low and extremely low income brackets.<sup>14</sup> In the Western Bay of Plenty district, 32.3 per cent of Māori were in these income brackets, compared with only 24.3 of the total population, while in the Tauranga district the figures for the same brackets were 31.5 per cent of Māori compared with 24.1 per cent of the total population.

Tauranga Māori were correspondingly *under*-represented in the higher income brackets, as can be seen from figure 9.1.

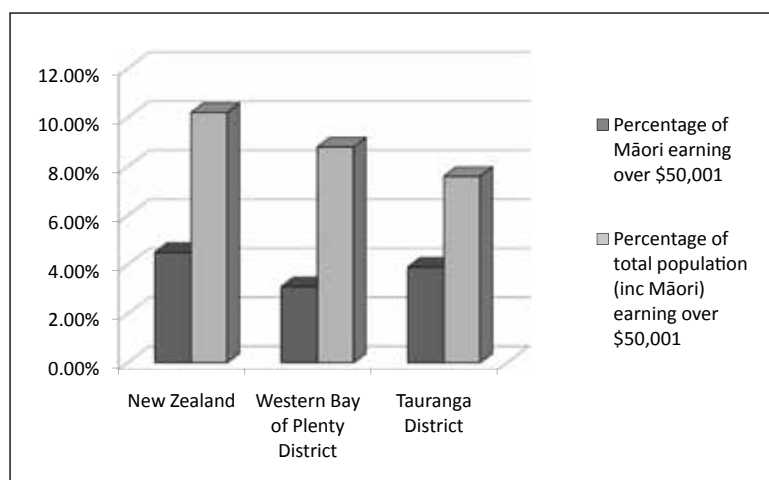


Figure 9.1: Proportion of Māori and of total population earning over \$50,001

11. Document s5, pp 47–58

12. Ibid, p 71

13. Ibid, pp 75–87

14. Income brackets mentioned in this paragraph as follows: loss–\$10,000 (extremely low, very low); \$30,001–\$50,000 (high); \$50,001–\$100,000 (very high); \$100,001 or more (extremely high)

At all income levels, outcomes for Tauranga Māori were worse than for Māori nationally.<sup>15</sup>

In both districts, the proportion of Māori deriving all or some of their personal income from Government benefits (between 40 and 45 per cent) was more than twice as high as the proportion of the total population in the district, and the percentage was higher than for New Zealand Māori as a whole (see fig 9.2).<sup>16</sup>

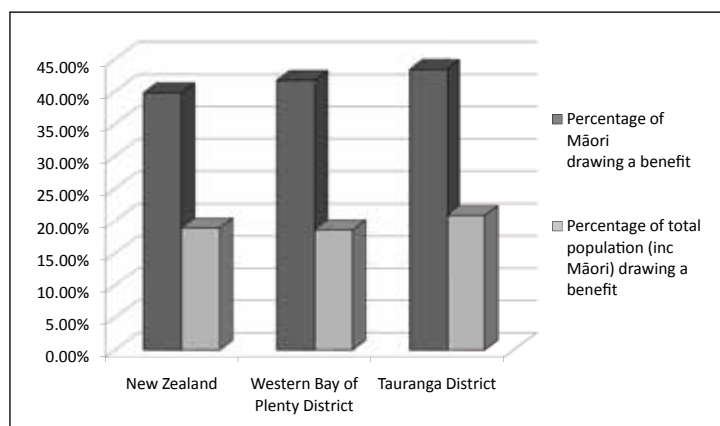


Figure 9.2: Proportion of Māori and of total population 15 years and over deriving income from Government benefits, 2001

### 9.2.5 Housing

The level of home ownership in the two Tauranga districts was markedly lower among Māori than the total population, although there were considerable variations between localities within the two districts. In 2001, 30.5 per cent of Māori in the Tauranga district owned their own home, with or without a mortgage. While this exceeded the national rate for Māori (30.1 per cent), there was a 24.4 percentage point gap between Māori and the district's total population. Māori home ownership rates in the Western Bay of Plenty district, at 37.1 per cent, were also higher than for Māori nationally but, again, the disparity with the local total population was high (23.3 percentage points).<sup>17</sup>

Using information provided in a report by Statistics New Zealand, Boulton also found significantly higher rates of crowding (as measured by the Canadian National Occupancy Standard) in Māori households than non-Māori. In the Tauranga district, for example, 18.8 per cent of Māori households were defined as crowded, compared to just 2 per cent of Pākehā households. In the Western Bay of Plenty district, the figures were 18.4 per cent and 2.3 per cent.<sup>18</sup> Finally, Māori in Tauranga Moana had lower rates of access to telecommunications such as telephone, fax, and internet.<sup>19</sup>

15. Document s5, pp 115, 124, 196

16. Ibid, pp 108, 123

17. Ibid, pp 159, 167

18. Ibid, pp 168, 176–177

19. Ibid, p 199

**9.2.6 Education**

Boulton could not find any ethnically differentiated data about participation or achievement in education (whether at the early childhood, primary, secondary, or tertiary levels) relating specifically to the inquiry district.<sup>20</sup> However, she did provide information about the highest educational qualification held by people in the two districts. In both, Māori were consistently less qualified than the total population. The disparity was most marked at the extreme ends of the qualifications spectrum, with a high proportion of the Māori population having no qualification compared with the total population. In the Western Bay of Plenty district, 41.4 per cent of Māori held no qualification (worse than for Māori nationally), compared to 27 per cent of the total population. In the Tauranga district, the comparable figures were 37.1 per cent (the same as for Māori nationally) and 23.7 per cent.

At the other end of the scale, only 4 per cent of Māori in the Tauranga district gained a tertiary qualification, compared with 10.1 per cent of the total Tauranga district population, although this performance was on a par with Māori nationally. In the Western Bay of Plenty district, the success rate, at 2.6 per cent, was considerably lower. However, the figure for the total population was lower, too, with the result that the gap was greater in the Tauranga district.<sup>21</sup>

**9.2.7 Health**

Boulton's study did not cover health, owing to a lack of ethnically specific data for the region.<sup>22</sup> Nor could we turn to statistics produced by the Bay of Plenty District Health Board, as they refer to a much larger area than the Tauranga inquiry district. However, there appears to be no reason why Māori health conditions in Tauranga Moana would substantially differ from those in other parts of the country, and we therefore rely in this instance on national data.

The most comprehensive recent analysis of Māori health is contained in the fourth *Hauora* report (2007), covering the years from 2000 to 2005. A wide range of unfavourable health statistics is presented in this study. The authors state, for instance, that although the gap between Māori and non-Māori life expectancy at birth has recently narrowed slightly, there are still 'stark disparities' – 69.0 and 73.2 respectively for Māori males and females, compared with 77.2 and 81.9 for non Māori (2000–2002 statistics).<sup>23</sup> Moreover, the Māori mortality rate for all causes of death (standardised for age and sex) was twice that of non-Māori (434 per 100,000 and 213 per 100,000 respectively). The authors point out that mortality rates increase in parallel with increasing socioeconomic deprivation among both

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20. Document s5, pp 126, 128

21. Ibid, pp 130, 144–145, 194

22. Ibid, p 2

23. B Robson and R Harris, eds, *Hauora: Maori Standards of Health IV; a Study of the Years 2000–2005* (Wellington: Te Rōpū Rangahau a Eru Pomare, 2007), pp 11, 16

Māori and non-Māori. However, because Māori are disproportionately represented in the most deprived areas, they are at higher risk of death overall, compared to non-Māori. In addition, within each level of deprivation, Māori death rates are higher than those of non-Māori at the same level.<sup>24</sup>

The *Hauora* study includes information about the causes of Māori mortality. In the period studied (2000–04), heart disease, strokes, cancer, respiratory disease, diabetes, and accidents were all more significant for Māori mortality than non-Māori:

- ▶ type 2 diabetes: death rate 7 times higher for Māori than non-Māori;
- ▶ respiratory disease: death rate 2.6 times higher for Māori;
- ▶ cardiovascular disease: death rate 2.3 times higher for Māori;
- ▶ accidents: death rate 94 per cent higher for Māori; and
- ▶ cancer: death rate 77 per cent higher for Māori.<sup>25</sup>

The study reveals a similar infant mortality trend, with rates for Māori 64 per cent higher than for non-Māori. For Māori children aged one to four years, the death rate was 36 per cent higher than for non-Māori; for the 5 to 14 age group, 47 per cent higher, and for the 15 to 24 age group, 60 per cent higher.

Hospitalisation data showed that, in the period 2003 to 2005, Māori age-standardised rates were 30 per cent higher than for non-Māori and, again, hospitalisation rates climbed in parallel with increasing socioeconomic deprivation. In younger age groups, causes of admission varied little between Māori and non-Māori, and rates of admission were generally not a great deal higher (with a few exceptions such as respiratory diseases). However, causes became more diverse with increasing age, with Māori in older age groups being hospitalised for a different range of causes from non-Māori, and at a greater rate. Variation was greatest in the 45 to 65 years age group.<sup>26</sup>

There have been significant advances in Māori health in the second half of the twentieth century. However, all in all, the disparity in health status between Māori and non-Māori at the national level has reduced little since reliable statistics became available, and it persists to this day. Nationwide, Māori are worse affected than non-Māori by almost every known health condition, and there is no indication that this disparity does not also exist in Tauranga Moana.

### 9.2.8 Conclusions

Boulton concludes her report by commenting that the ‘snapshot’ she has taken of Māori demographic and socioeconomic status in the Tauranga Moana inquiry district in 2001 indicates that ‘Maori were significantly disadvantaged in comparison with the total

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24. Ibid, p 33

25. Ibid

26. Ibid, pp 63–65, 69



population in the district in all of the key socioeconomic indicators relating to employment, occupation, income, educational qualifications and housing.’<sup>27</sup> As counsel for one of the claimant groups told us, none of Boulton’s conclusions is surprising, but her empirical study is nonetheless valuable because it validates what was known only anecdotally or intuitively.<sup>28</sup>

Unfortunately, little detailed statistical evidence was presented to us about the extent to which socioeconomic disadvantage has affected Tauranga Māori in the past. But it seems clear enough from the research reports we received (and which we shall discuss in the following section) that comparative deprivation in the region is nothing new and may well have its roots in past events – including land and resource loss.

### 9.3 THE SOCIOECONOMIC IMPACT OF LAND LOSS AND RAPID URBANISATION

This section examines evidence about the relationship between the relative socioeconomic deprivation of Tauranga Māori since 1886 and their loss of land and resources. What was the connection between these two realities?

We explore this question first with reference to several key research reports that were commissioned for this inquiry; their focus is primarily on the material deprivation experienced by Tauranga Māori. We then turn to examine the cultural and social malaise which many of the claimant witnesses described – a malaise that they considered both derived from the economic situation their hapū faced in the wake of land loss, and contributed to it.

#### 9.3.1 Land loss and socioeconomic deprivation

The commissioned research reports, and particularly the two overview reports by Tony Nightingale and Kathryn Rose,<sup>29</sup> provide us with a good picture of Māori economic and social conditions in Tauranga Moana up to the 1960s. Less complete is the evidence for the more recent decades of the twentieth century.

Both Nightingale and Rose describe a situation in which the emerging nineteenth-century Māori economy – characterised by traditional cultivation and resource gathering, supplemented by commercial agriculture – had been disrupted by the confiscation and alienation of land, and the accompanying decline in social cohesion. Thus, Nightingale writes, ‘the issue of land ownership was closely tied to the ability of Tauranga Maori to support

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27. Document s5, p 200

28. Counsel for Ngāti Hinerangi and associated hapū, closing submissions, 5 December 2006 (doc U24), p 31

29. Tony Nightingale, ‘Tauranga Moana: a Social and Economic Impact Report 1865–1960’ (commissioned research report, Wellington: Crown Forestry Rental Trust, 1996) (doc A39); Kathryn Rose, ‘The Impact of Confiscation: Socio-Economic Conditions of Tauranga Maori’ (commissioned research report, Wellington: Crown Forestry Rental Trust, 1997) (doc A38)

themselves and their children.<sup>30</sup> Similarly, Rose observes that the loss of land – the social, economic, and cultural basis of Māori society – ‘had severely negative consequences upon Tauranga Maori’ that are still being felt today.<sup>31</sup>

#### (1) Health

Using contemporary reports, Nightingale documents many instances in which groups of Tauranga Māori faced starvation in the latter decades of the nineteenth century and for some years after 1900.<sup>32</sup> He also draws on contemporary evidence to show that communicable diseases were responsible for much sickness and death in this period. Introduced infections, including those associated with poverty (for example, typhoid and tuberculosis), ravaged the Tauranga Māori population, just as they did elsewhere in the country.<sup>33</sup> The region shared in the great nineteenth-century decrease in Māori population, as the Tribunal noted in its first Tauranga report.<sup>34</sup> Even though immunity to many diseases increased during the century, and population decline ceased around the time the new century dawned, poor standards of health persisted among Māori until the present.

Rose’s report, too, shows that many Tauranga Māori faced low standards of living and high rates of disease in the earlier part of our period, and links these issues with the inadequacy of the land base.<sup>35</sup> She documents the succession of epidemics that constantly disrupted attendance at native schools in the district during the first two decades of the century.<sup>36</sup> Outbreaks of typhoid fever continued to affect the Māori population during the 1920s and 1930s,<sup>37</sup> a period when Māori throughout New Zealand also had high rates of tuberculosis. We were not given detailed evidence about its prevalence in Tauranga, but Rose quotes several pieces of anecdotal evidence, including the belief of doctors in the town in 1939 that the disease was to be found ‘in nearly every Maori.’<sup>38</sup>

#### (2) Housing

Despite their state of health, the Māori population of Tauranga County (an area larger than the inquiry district) grew rapidly from just under 1500 in 1891 to more than 3300 in 1945.<sup>39</sup> This fast-growing population, almost entirely rural, depended on land resources that were already small and that diminished further as the years passed. Nightingale and Rose see

30. Document A39, p 49

31. Document A38, p 1

32. Document A39, pp 49–51

33. Ibid, pp 3, 6, 9, 33

34. Waitangi Tribunal, *Te Raupatu o Tauranga Moana*, p 56

35. Document A38, pp 101–110

36. Ibid, pp 1–2, 23

37. Ibid, pp 128–131

38. Ibid, p 156. The quotation is taken by Rose from Linda Bryder, ed, *A Healthy Country: Essays on the Social History of Medicine in New Zealand* (Wellington: Bridget Williams Books, 1991), pp 124–125.

39. Document A39, p 31

the resultant economic problems as contributing to the inadequacy of Māori housing. They both refer to a survey made in the Tauranga area by the health inspector RW Pomare in 1936, showing that more than a third of the 233 Māori houses on which he had conducted a detailed inspection were ‘unfit for human habitation’: 46 per cent were unglazed or had no windows at all; 79 per cent were damp; 50 per cent were poorly ventilated; nearly 25 per cent had earth floors; and 58 per cent were overcrowded. Fewer than 28 per cent of the dwellings were lined, and only 23 per cent had ceilings. In 47 per cent of the total number of houses he visited (369), there were no toilet facilities and only two houses had water laid on; most of the other relied on creeks, rainwater, wells, and springs.<sup>40</sup> The Director-General of Health told the Native Department that the survey results demonstrated the ‘urgency’ of the Māori housing programme.<sup>41</sup> Pomare’s report was accompanied by a list of 450 Tauranga Māori who had inadequate bedding, or clothing, or both; many also had insufficient food stores to get them through the winter. Noting that most households relied on kūmara and potato crops, which had recently failed, he felt justified in saying that, ‘if it were not for this fair land being blessed with such an abundance of Nature’s foods such as fish and shellfish, and my people’s ability to utilise those blessings when the necessity arises, there would be many in this area starving.’<sup>42</sup>

When the Native Minister visited Katikati in the following year, he was given a description of housing conditions by a Māori deputation:

There are Maori old age pensioners in this district without houses and land, and they are living in a quagmire of distress and hardship. Some of them are living in shed and in very poor houses. In one case the rooms are only 7 feet by 9 feet and this small house accommodates six adults and six children. Many other similar cases can be quoted. We are asking you to see if the Government will build houses for these people.<sup>43</sup>

This evidence is reinforced by census data about the nature of Māori dwellings in Tauranga County between the 1920s and 1950s:

- *Type of dwellings*: In 1926, a substantial proportion (18 per cent) of Māori dwelling were described as ‘huts or whares’; another 19 per cent were ‘tents’ and ‘camps’.<sup>44</sup> Ten years later, even more dwellings (40 per cent) were ‘huts or whares’, and 6 per cent were ‘temporary’.<sup>45</sup> The figures for 1945 were lower: 27 per cent were ‘huts, whares and

40. RW Pomare, ‘Maori Housing Survey, Tauranga County’, 18 August 1936 (doc A38(a), pp 269–272)

41. Director-General of Health to under-secretary, Native Department, 8 September 1936 (doc A38(a), p 267)

42. RW Pomare to medical officer of health, Auckland, 17 August 1936 (doc A38(a), pp 274–276)

43. Native Minister to under-secretary, Native Department, 10 April 1937 (doc A38(d), p 1508)

44. Census and Statistics Office, *Dominion of New Zealand Population Census, 1926*, ‘Maori and Half-Caste Population’, vol xiv, ‘Nature of Dwellings, by Counties’ (Wellington: WAG Skinner, Government Printer, 1929), p 58

45. Census and Statistics Department, *Dominion of New Zealand Population Census, 1936*; ‘Maori Census’, vol III, ‘Nature of Dwellings, by Counties’ (Wellington: EV Paul, Government Printer, 1940), p 36



Figure 9.3: Māori children at home in Goods Road, Ōtūmoetai, 1960

Photographer unknown. Reproduced courtesy of Tauranga City Libraries (01–639).

atches', and less than 2 per cent were 'temporary'.<sup>46</sup> Without further information, these statistics tell us little, but they do indicate that the Māori housing situation in the district was far from satisfactory.

- ▶ *Size of dwellings*: A large proportion were recorded as being very small – in 1926, 18 per cent had only one room, and 27 per cent had two rooms. The figures for 1936 were 20 per cent and 23 per cent.<sup>47</sup>
- ▶ *Crowding*: The average number of occupants (temporary dwellings excluded) in 1926 was 5.9, with similar numbers (5.7 and 5.6) recorded in 1936 and 1945.<sup>48</sup>
- ▶ *Facilities*: Only a third of all permanent Māori dwellings were reticulated for electricity in 1945, and only a quarter had water laid on. Just 23 per cent had a bathroom, only 11 per cent had hot water, and only 14 dwellings had a flush toilet.<sup>49</sup> As late as 1956, less

46. Census and Statistics Department, *New Zealand Population Census, 1945*; 'Maori Census', vol III, 'Nature of Dwellings, by Counties' (Wellington: RE Owen, Government Printer, 1950), p 44

47. *Dominion of New Zealand Population Census, 1926*, vol XIV, p 64; *Dominion of New Zealand Population Census, 1936*, vol III, p 42

48. *Dominion of New Zealand Population Census, 1926*, vol XIV, p 60; *Dominion of New Zealand Population Census, 1936*, vol III, p 39; *New Zealand Population Census, 1945*, vol III, p 47

49. *New Zealand Population Census, 1945*, vol III, p 53

than half the dwellings (42 per cent) had water laid on, only 34 per cent had hot water, 44 per cent had a bathroom, and 15 per cent had a flush toilet.<sup>50</sup>

### (3) *Employment and income*

According to Rose, in the late nineteenth century Māori tended to look for employment in activities not dependent on landholding, such as road construction, labouring on settler farms, and gumdigging. Some Māori did try sheep farming but it was only on a small scale and – like wheat growing, which had been revived in the 1890s – it did not continue long.<sup>51</sup> Rose reports a pertinent comment made by an official in 1891 about the people of Hūria: '[as they] have very little land they have still to depend on gum-digging and earn a precarious living by working about the town'.<sup>52</sup> The same official described their living conditions in the following terms:

The land that they possess at Hūria is little in quantity and poor in quality – quite worked out in fact. These Natives lead a miserable existence, partly at Hūria endeavouring to get some return from their ungrateful glebe or working precariously for neighbouring Europeans; and, when this fails, retiring inland and working in the bush or wearing out their constitutions on the gum fields.<sup>53</sup>

Rose regards the situation of Hūria Māori in the 1880s and 1890s as an example of how a 'cycle of deprivation' could soon become entrenched because of interlinking factors. As the official observed, the lack of usable land at Hūria meant that many residents sought waged employment on the gum fields and seasonal work on farms. This resulted in absenteeism at the school – which, when combined with the impact of frequent hunger and malnutrition among pupils, led to low academic achievement and ongoing reliance on low-skilled wage employment (when it was available). Low income levels meant poor living conditions and frequent sickness in the community.<sup>54</sup>

In the new century, farming (especially dairying) and infrastructure developed as Pākehā settlement expanded across the district. The Pākehā population of Tauranga County tripled between 1901 and 1921, reaching 7725 by 1921. Although Māori were also experiencing a population increase (to 2190 in 1921, a figure that nearly doubled by 1951 and nearly tripled by 1966), they were now greatly outnumbered in the district.<sup>55</sup> In 1907, Māori were growing crops on their land, and some were dairy farming, but labouring work was an important means of support. The report of the Stout–Ngata commission pointed to the growing

50. Department of Statistics, *New Zealand Population Census, 1956*; 'Maori Population and Dwellings', vol VIII, 'Inhabited Private Dwellings' (Wellington: RE Owen, Government Printer, 1960), pp 93, 100

51. Document A38, pp 38–41

52. 'Education: Native Schools', 1891, AJHR, 1891, E-2, p 7 (doc A38, p 42)

53. Inspector of Native Schools, report, July 1891 (doc A38(e), p 1580)

54. Document A38, pp 55–56, 62–66

55. Ibid, pp 74, 175

importance of wage employment in the life of Tauranga Māori when it noted that ‘Most of the county work and of the farm labour of the Europeans is done by the Maoris, and but for this supply of Maori labour it would be impossible to carry on farming.’<sup>56</sup>

Rose describes the impact of the potato blight in 1906 as an illustration of the vulnerable position of Tauranga Māori at this time.<sup>57</sup> Serious crop failures in 1936 also brought much hardship to the district. Pomare’s notes on the financial position of householders when he surveyed Māori dwellings that year indicate that a great number relied on casual labour, the income from a few cows, or part-time relief work; a few had farm, forestry, railway, or public works jobs.<sup>58</sup> In terms of Government assistance, we have also seen (sec 3.5.1) how the Kaitimako development scheme provided labouring work for around 30 men in the mid-1930s, subsidised from Government unemployment funds.

Through the evidence of Karora Te Mete, we gained an insight into what life was like for tangata whenua in this period. He said that as a child in Bethlehem in the 1930s and 1940s, his hapū’s meagre landholdings supported pigs, potatoes, kūmara, watermelons, and maize, while some families ran a few cows. This sustenance was supplemented by the then-abundant resources of the harbour, while many of the men found work in forestry and hydro construction projects outside the Tauranga district: ‘Most of the men that were forced to leave their families for work were away from home for months on end. They would send or bring money home to supplement the little income that was being made by those at home.’<sup>59</sup>

#### (4) Urbanisation

From the late 1940s, Tauranga’s urban and industrial areas expanded rapidly. The port at Mount Maunganui was developed and, from the 1950s onwards, the district’s horticulture sector became increasingly significant.<sup>60</sup> The vast majority of the Māori population of the inquiry district still lived in rural parts of the district: as late as 1956, only 195 Māori lived within the boundaries of Tauranga borough.<sup>61</sup> However, as we saw in chapter 5, the settlements where many Māori lived were on the edges of the fast-growing town, and soon the urban area spread and engulfed these places.

Surveys at this time revealed that poor living conditions persisted in Māori settlements around Tauranga Moana. At Rereatukahia (near Katikati) in 1955, for example, housing conditions were shown to be so bad that this settlement of about 100 residents was classified as a ‘depressed area’ and given priority for attention under the Māori Affairs housing programme. Closer to the town of Tauranga, the incorporation of Hūria, Maungatapu, and

56. R Stout and AT Ngata, ‘Native Lands and Native Land Tenure: Interim Report of the Native Lands Commission’, 11 June 1908, AJHR, G-1K, p1 (doc A38, p 80)

57. Document A38, pp 82–84

58. R Pomare, Tauranga County Māori Housing Survey notes, 1936 (doc A38(c), pp 877–888)

59. Karora Te Mete, brief of evidence, undated (doc D9), pp 3–5

60. Document A38, p 148

61. Ibid, p 137



Hairini into the borough brought housing conditions in these settlements into the public eye. Officials had already discovered in 1955 that all but two of the houses at Hūria were in a poor condition. In 1959, it was found that none of the houses at Maungatapu was in a satisfactory condition. In the 1960s the ‘urgent’ need to replace housing described as ‘sub-standard’ was often mentioned. A Māori Affairs survey in 1965 showed that approximately a quarter of the Māori houses in Tauranga and Te Puke were considered to be unsatisfactory, being of unsound construction, overcrowded, or both.<sup>62</sup>

Rose’s report draws on a survey conducted by the Ministry of Works in the early 1960s,<sup>63</sup> which indicates that Tauranga Māori were only marginally involved in the economic growth of this period. Although they gained employment in the construction and timber industries, their land tended to be unproductive, and most of their dairy farms were too small to be economic. According to the survey, even if all the available Māori land in the Bay of Plenty were developed, it would not be sufficient to support the rapidly growing Māori population.<sup>64</sup>

A research report examining the particular experience of Ngā Pōtiki adds specificity to this general picture. It describes how this hapū experienced the combined effects of the lack of usable tribal land, Crown education policy, and Māori vulnerability to market and political policy fluctuations in the last two decades of the twentieth century. For example, the Port of Tauranga became a major employer of Māori waged labour, but then when restructuring began in the 1980s, many Māori port labourers found themselves unemployed with few other employment options.<sup>65</sup> The effects of this experience were described for us by Gordon Ranui, a claimant for Ngāti Ruahine, who commented how the wharf had had a big impact in Tauranga, giving people work and bringing money into the community. But the benefits did not last, he said: ‘When the government’s reforms came in 1989, only a quarter of the jobs remained.’<sup>66</sup> Similarly, in a 1997 survey conducted by Ngāi Te Rangi and Ngāti Pūkenga, one respondent said: ‘I support the port because it brings employment . . . but sometimes I wonder whether Maori get to benefit from the employment opportunities there.’<sup>67</sup>

Statistics gathered by the Bay of Plenty Area Health Board in the early 1990s demonstrate how Māori were unduly affected by employment shortages. Although Māori constituted only 14 per cent of the working-age population in the Tauranga and Western Bay of Plenty

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62. Document A38, pp 157, 162–165

63. Town and Country Planning (Ministry of Works), *National Resources Survey Part II: Bay of Plenty Region* (Wellington: RE Owen, Government Printer, 1962)

64. Document A38, pp 148–150

65. Linda Tuhiwai Smith et al, ‘Socio-Economic Impact Report for Nga Potiki’ (commissioned research report, Wellington: Crown Forestry Rental Trust, undated) (doc M1), pp 115–120

66. Gordon Te Reo Hau Ranui, brief of evidence, 22 May 2006 (doc Q7), p 4

67. Te Rūnanga o Ngaiterangi Inc, ‘Nga Korero Whakahiahia o Ngaiterangi me Ngati Pukenga’, 1997 (doc B16), p 39

districts in 1991, they made up 25 per cent of the registered unemployed.<sup>68</sup> And, as the Ngā Pōtiki report notes, lack of alternatives in the form of useable tribal lands increased the likelihood of welfare dependence.<sup>69</sup>

### 9.3.2 Land loss and cultural malaise

A recurring theme from claimants was that the loss of land and resources was inextricably entwined with the failure of Māori society to flourish in Tauranga. By this, witnesses meant a failure to experience not just economic prosperity but also cultural vitality, integrity, and well-being. Amy McLaughlin, of Ngāti Ruahine, for example, spoke about the connection between land, tribal identity, and well-being:

Land is not seen as an economic resource, as it is also owned by the heart and in the mind of Maori and conversely the land itself owns the people. The land is our history book. It holds our whakapapa of historical whanau events which becomes the heartbeat of its people. This gives us identity, a sense of belonging, a confidence in who we are.<sup>70</sup>

Ms McLaughlin described the effects of her people's disconnection from the land, and thus also from their culture, as 'debilitating'.<sup>71</sup> The damage done to tribal well-being when this tie with the land is severed was also described by Beverley Flavell, of Ngāi Te Rangi, a health worker of long standing. For her, the loss of most of the tribal land manifested itself in 'an underlying mate wairua [that] expresses itself in the unwellness I have witnessed these last 50 years'.<sup>72</sup> 'That is our hapu experience', she said.

The wide-ranging effects on health were also the focus of the testimony given by Trudy Ake of Pirirākau. Speaking particularly about the effects of losing areas of bush, she explained how it meant a loss of access to traditional medicine and a resultant loss of knowledge about traditional healing methods:

Compressed into a smaller area we lost access to much of our natural pharmacological and rongoa supplies from the bush as well as our bush food supplies.

Without the bush the knowledge of the uses of many of our Maori medicines and practices was lost due to lack of use. . . .

. . . whanau became increasingly dependent on the Chemist, the General Practitioner and the Nurse for illness management, medicines and advice.

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68. A Norrish and S Twitchin, 'Proportion of Unemployed who are Māori', 1992 *Health Status Review* (Te Puke: Bay of Plenty Area Health Board, 1992), p 22

69. Document M1, pp 115–120

70. Amy Sinai McLaughlin, brief of evidence, 25 September 2006 (doc s22), pp 5–6

71. Ibid, p 3

72. Beverley Anne Perori Flavell, brief of evidence, 18 June 2006 (doc R9), p 11

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Access to the advice . . . was hindered by financial, language, cultural and distance barriers.

The use of Pakeha remedies and health management practices had to be learned, taught often by strangers with little comprehension or knowledge of the circumstances of our life.<sup>73</sup>

‘For many of us within the hapu of Pirirakau,’ said this witness, ‘we are still having to face the impact of chronic illness and untimely deaths.’<sup>74</sup>

Because the loss of land affected so many aspects of life, claimants said its impact was felt by successive generations. Te Whakaotinga Louis Te Kani, of Ngāi Tūkairangi, a lawyer with experience in criminal and Family Court matters, felt strongly that an alienation from land and culture had ‘created poverty not only economically but also poverty of knowledge and of things Maori’. He saw this as particularly harmful to young people:

Many young Maori have lost that traditional role of being part of an active community, and have lost the support systems that are part of such a community. Many young Maori have lost access to resources to sustain them both physically and mentally. Many young Maori have lost their sense of purpose, their sense of belonging and have lost a system of law that they knew and respected.<sup>75</sup>

He then went on to emphasise how these losses affect the place of young Māori in society:

Consequently these Maori are often ending up unemployed and in lower socioeconomic standards. Many young Maori I act for today also suffer from a loss of identity. Whilst they know they are Maori, many are unable to provide a basic whakapapa, or identify their hapu or iwi. Many of them identify more readily with the ‘role models’ that they see on television such as African-American rappers. All of these factors in my mind contribute to many young Maori turning to crime.<sup>76</sup>

A similar view was expressed by Andrew Walker, of Ngāti Hē, a youth social worker in Tauranga, who saw a clear relationship between past land loss and the social problems he encountered in his work. Speaking of the intergenerational nature of such problems, he said:

I feel that it would be fair to say that these problems can to some extent be traced back to when the whanau were removed from or otherwise lost connections with their customary lands.

I think it is clear that the loss of whenua, land for the whanau over the generations contributed to a loss of identity, worth, respect and sense of belonging. These Maori whanau

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73. Trudy Ake, brief of evidence, undated (doc B11), p 2

74. Ibid, p 5

75. Te Whakaotinga Louis Te Kani, brief of evidence, June 2006 (doc R5), p 5

76. Ibid

came to see that modern society offered little positive benefits for themselves. As a result they came to engage in recurring patterns of anti-social behaviour.<sup>77</sup>

Rahera Ohia, of Ngāti Pūkenga, also commented on the likelihood of a connection between land issues and tribal decline. Acknowledging the difficulty of finding reliable data that would enable any authoritative conclusions on the matter, she nevertheless felt it was ‘inconceivable . . . that such a demise could be seen as either an extremely unhappy coincidence or, alternatively, a reflection of some genetic or culturally embedded predisposition to failure.’<sup>78</sup>

The assertion that Māori land loss has had severe ongoing effects, social as well as economic, is made not only by claimants. It has also been strongly argued by academic authorities such as Professor Mason Durie, who writes:

Health and well-being are associated with tribal land ownership, mana whenua. There are two considerations. The first, best understood in economic terms, recognises the value of land according to its capacity to produce, either for the market or for subsistence purposes. The second is related to the value of land as an anchor stone providing a source of personal and tribal identity and a reason for cohesion with other members of the family group.<sup>79</sup>

Several commissioned research reports describing the effects of land and resource loss on particular hapū also emphasise the cultural and social effects that accompanied material deprivation. Roimata Minhinnick describes both the devastating immediate effect of raupatu on Ngāti Hangarau, and also its numerous ongoing effects – including the loss of mana, the decline of custom and language, and the lack of an economic base.<sup>80</sup> And in ‘Nga Tatai Korero o Ngati Hangarau’, Mere Balzer examines the long-term impact of raupatu on the same hapū. Based partly on interviews, the report describes the social, economic, health, spiritual, cultural, and educational outcomes of the loss of land and resources on Balzer’s informants and on the Ngāti Hangarau community generally.<sup>81</sup>

The ‘Socio-Economic Report for Nga Potiki’, commissioned by the Crown Forestry Rental Trust, uses documentary research, a social impact survey, oral testimony, and statistics from three censuses (1986, 1991, and 1996). It identifies marked socioeconomic disparities between the Māori and non-Māori populations of Tauranga – findings that are consistent with Leanne Boulton’s study using data from the 2001 census. The impacts of land loss described in the Ngā Pōtiki report are negative and cumulative – land loss damaged

77. Andrew Augustine Walker, brief of evidence, 27 June 2006 (doc R35), p 2

78. Rahera Ohia, brief of evidence, 26 June 2006 (doc R38), p 2

79. Mason Durie, *Whaiora: Maori Health Development*, 2nd ed (Auckland: Oxford University Press, 1998), p 35

80. Roimata Minhinnick, untitled report on Ngāti Hangarau (commissioned research report, Wellington: Waitangi Tribunal, 1999) (doc D5), p 89

81. Mere Balzer, ‘Nga Tatai Korero o Ngati Hangarau’ (commissioned research report, Wellington: Waitangi Tribunal, 1999) (doc D25)

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the hapū's mana and social cohesion, excluded it from the benefits of development in the region, and created consequent socioeconomic disparities. The report also examines the effect of certain specific losses suffered by the hapū, which saw its land used for a quarry, a rubbish dump, and a sewage treatment plant. The repercussions were many: the surrounding land was devalued, vital food resources (such as flounder) were contaminated, and the use of their land for such culturally offensive purposes impacted negatively on the physical, mental, and spiritual well-being of hapū members.<sup>82</sup>

**9.3.3 Conclusions**

The evidence of the claimants spoke of a close association between land and resource loss, the weakening of hapū and iwi identity, economic disadvantage, and cultural malaise. They described how these factors had impacted society and culture over many years: conditions in one generation had been perpetuated in the next and, to some degree, determined its expectations and achievements. They saw this ongoing cycle affecting all aspects of their existence; to claimants, the impacts of land and resource loss remain today. Similarly, the socioeconomic impact reports and official statistics all point to a connection between land and resource loss, material deprivation, and cultural malaise. As Kathryn Rose comments, 'the story of the Tauranga Maori economy from the 1880s is one of increasing marginalisation'.<sup>83</sup>

We turn now to examine the socioeconomic impacts of the legislative and policy regimes for Māori landholding: as with land loss, have these regimes also contributed to the poor economic and cultural situation of Tauranga Māori?

**9.4 THE SOCIOECONOMIC IMPACT OF REGIMES FOR MĀORI LANDHOLDING****9.4.1 Introduction**

Did the Crown's legislative and policy regimes that governed Māori landholding from 1886 to 2006 contribute to the economic and cultural marginalisation of the claimant iwi and hapū? The regimes themselves have been described and discussed in chapters 2 and 3 and we do not repeat that discussion here; our coverage of rating and planning issues in chapters 5 and 6 is also relevant. In the present chapter, we focus on the effects of these laws and policies on Māori economic and community life.

In discussing 'marginalisation', we use the word to denote two things – the comparative deprivation of Māori in terms of resources; and also a situation in which the interests, aims,

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82. Document M1, pp 29, 87–96, 105–106

83. Document A38, p 1

and cultural values of the dominant Pākehā majority were recognised and acted on but those of Māori were ignored or relegated to the sidelines.

We deal first with the years before 1945, and then with the era of rapid development and urbanisation after the Second World War.

#### **9.4.2 Regimes for Māori landholding before 1945: the economic, social, and cultural impacts**

By 1886, the foundations for the Crown's management of Māori landholding in New Zealand had already been laid, particularly through the move to individualise Māori land tenure. As the Tauranga Tribunal found in its earlier report, the Crown's destruction of customary tenure following the hostilities of the 1860s breached the principles of the Treaty. It also had a serious prejudicial effect: individualisation 'amounted to a radical reordering of society that gravely diminished tino rangatiratanga or chiefly authority, which was guaranteed to Maori by article 2 of the Maori text of the Treaty'. The Tribunal stated that in Tauranga, as in other regions, individualisation 'led inevitably' to 'inter- and intra-tribal divisions, tribal dispersal, curtailment of traditional leadership, unequal wealth distribution, title fragmentation, and land alienation'. The imposed system critically undermined the very foundations of hapū life, and made the land susceptible to alienation.<sup>84</sup>

In considering whether the prejudice that arose from tenure individualisation (and the ensuing regime of Māori land law) continued in the period after 1886, we look at the economic and social impacts of some key aspects of the Crown's legislative and policy regime for Māori land.

##### **(1) Alienation**

The huge extent of land loss, detailed in earlier chapters and in the stage 1 report, made it highly likely that socioeconomic effects would occur, and raises questions about the Crown's role in such a potentially damaging diminution of the Māori land base in the region. It is, however, untrue to say that the Crown's Māori land legislation totally failed to recognise the need to protect Māori from the long-term effects of land loss; indeed, at various points, the legislation placed fairly stringent restrictions on alienation. In the period before 1886, lands in Tauranga were in many cases made subject to these restrictions, as the Tauranga stage 1 report explained. The protection offered was largely ineffectual, however, and the Tribunal found that the Crown failed to adequately supervise the process of land alienation. Thus, by 1886, large quantities of land had been sold by Māori owners, not necessarily with their free and willing consent.<sup>85</sup>

84. Waitangi Tribunal, *Te Raupatu o Tauranga Moana*, pp 306, 404

85. Ibid, pp 311–313, 348–349, 350–353



Despite this large-scale alienation, John Ballance's view was apparently that Tauranga Māori still had ample land, because he declared to his Māori audience at Whareroa in 1885 that 'there is no reason, with your large landed possessions, why you may not in the future attain to a position of great prosperity and happiness'.<sup>86</sup> But even had the reference to 'large landed possessions' been true, the situation was not to last. Indeed, the 1890s saw a greater amount of land alienated than in any other decade between 1880 and today. Roughly half the land alienated in the 1880s and 1890s was purchased by the Government, and the remainder by private buyers.<sup>87</sup> In what was then an agrarian economy, land was fundamental to economic development, yet Māori land was rapidly being lost.

## (2) *Utilisation and development*

Even when Māori land was retained by its owners, it was not always possible to derive much economic benefit from it. The difficulty of productively utilising multiply owned land became increasingly serious over the years as individual interests proliferated. A letter to the Government in 1922 outlined these problems:

I am a Native residing at Tauranga, and together with my relatives am interested in numerous Native lands here and elsewhere . . . The area belonging to each of us varies from ½ acre up to 5 acres, and on account of the small size of the holdings and the fact that they are scattered all over the District makes it impossible for me or my relatives to work our holdings . . . The result is that the land is useless to us as it is quite impossible to cultivate these small detached areas. We are unable to get any benefit from our lands and the present condition of the land is keeping back the growth of the District, and all the time Noxious weeds are flourishing. This state of affairs exists not only for me but for the majority of Native owners in this District.<sup>88</sup>

As this document suggests, the multiplicity of individual owners hindered efforts to manage and use the remaining land in a united way. Additionally, in Tauranga as elsewhere, Māori owners were severely hampered by their lack of access to the capital necessary for developing their land, and by a lack of training in new farming methods, as we have discussed in chapter 3. Preoccupied with encouraging farming opportunities for Pākehā farmers, governments seemed blind to the need to find a way of helping Māori to become farmers.

As we have seen, three native land development schemes finally began in Tauranga Moana in the 1930s and a fourth in the 1950s. These schemes constituted the Crown's first substantial attempt to address the problems of tenure, finance, and expertise that were

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86. 'Notes of Native Meetings', 7 January 1885, AJHR, G-1, p 59

87. Document T16(a), p 31

88. R Callaway to Native Minister, 29 September 1922 (doc A38(b), p 718)

inhibiting Māori farm development. But despite delivering some benefits during the economic depression of the 1930s and afterwards, the schemes often pushed the owners into debt and excluded them for many years from any control of their lands. (Again, see chapter 3 for a full discussion of these schemes.)

So while the Crown eventually took steps to assist Māori landowners to develop their lands, the mechanisms introduced were not adequate. In general, Māori in the Tauranga district continued to face obstacles that impeded their ability to utilise land and profit from ownership. This, in turn, affected their earning capacity, and consequently their socioeconomic situation.

#### **9.4.3 Regimes for Māori landholding after 1945: the economic, social, and cultural impacts**

As urbanisation proceeded apace after the Second World War, several factors converged to make owners of multiply owned Māori land in Tauranga particularly vulnerable to further non-volitional land and resource loss. The new realities of this period impinged on iwi and hapū life in many ways, making it harder for Māori values to be maintained, needs to be met, and aspirations to be realised. Among other effects, Māori found it difficult to maintain marae communities and to improve housing quality on their own land. As the following survey of the socioeconomic impact of legislative regimes shows, in this period of rapid change, many Tauranga Māori experienced economic disadvantage, a sense of powerlessness, and a lack of involvement in or control over their remaining tribal estate.

##### **(1) Alienation**

Although Māori land alienation was, in general, not huge during the second half of the twentieth century, we have seen in chapter 2 how there was a noticeable ‘spike’ between 1960 and 1979, with public works takings being a noticeable factor in that. While it is true that the various construction projects provided employment opportunities for Māori, the acquisition of Māori land for public works also disadvantaged hapū by further reducing an already depleted land base. Urban spread and the need for housing increased the value of Māori land near the city, but also put great pressure on it, for example through actual or potential rates debt, and brought much subdivision and alienation. Other land loss, as we have seen, was brought about by measures such as the compulsory acquisition of ‘uneconomic’ land interests from deceased estates.

##### **(2) Utilisation and development**

By 1950, the amount of remaining Māori land capable of generating a good economic return was becoming fairly limited. Māori had holdings on inshore and offshore islands, in the inland hill country, and in scattered localities around the western shores of the harbour,

## 9.4.3(3)

but most of the economically viable Māori land was situated around the eastern reaches of Tauranga Moana near the expanding town (see map 2.12 in chapter 2).

Utilising this land was no simple matter. As in previous decades, the difficulty of raising capital or borrowing on multiply owned land had a direct impact on the economic status of Tauranga Māori, and ultimately affected their social and cultural well-being too. Lack of access to finance increased the likelihood that their land would be under-utilised and alienated – and while ‘Europeanisation’ did make access to finance easier, it also took away protections, which again tended to facilitate alienation.

On a positive note, legislation provided for a range of incorporations and trusts to manage the economic utilisation of Māori landholdings and, in the 1970s, Māori Affairs loans helped some Tauranga Māori to develop land for such purposes as kiwifruit orchards. Eventually, however, this useful assistance ceased, and the lack of access to finance was mentioned in the evidence of several claimants. Referring to the sale of her parents’ farm to repay development debt in that period, Rahera Ohia, of Ngāti Pūkenga, commented on the link between the difficulty of accessing finance and an erosion of the tribal economic base:

It seems to me that when times got tough our iwi didn’t have that buffer of capital or land to get us through unscathed. Our people found it difficult to diversify when dairying slumped and they found it almost impossible to safely raise finance for them to develop into new areas of land use sustainably.<sup>89</sup>

Since the demise of the Māori Affairs Department and its land development programmes, the Crown’s help with development has been of a limited nature. As we concluded in chapter 3, this greatly hindered the ability of Tauranga Māori to develop their lands in a region where economic development has otherwise been remarkable.

**(3) Rates, alienation, and marginalisation**

Pākehā concerns about ‘unproductive’ Māori land which did not generate sufficient income to pay rates and could not contribute to the development of infrastructure led, in the early 1950s, to legislation designed to facilitate both the development of such land and the payment of rates. As chapter 5 has shown, during the 1950s and 1960s the Tauranga County Council took action against Māori land on which rates were owed, by lodging receivership applications with the Māori Land Court and getting the land leased out. Then, in the late 1960s and 1970s, soaring land valuations in the district placed enormous new pressures on Māori landowners. In Māori communities that were zoned urban, fears of accumulated rates charges sometimes encouraged the subdivision and alienation of land as the only means of preserving the value of the assets. In areas zoned rural, Māori farmers were burdened with many legal and economic restrictions on the use of their land and, as we

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89. Document R38, p 9

have said, suffered persistent difficulties in accessing finance. They faced economic paralysis: many dairy farms and other pieces of land became uneconomic, and were abandoned or sold.

The burden of rates at that time needs to be viewed as one of many pressures that accompanied a period of rapid and unprecedented urban growth. However, claimant evidence before this Tribunal confirmed that high valuations and other rating problems are still a key issue for owners of Māori land in Tauranga today, particularly in the case of peri-urban land. As Rahera Ohia commented, the rates burden all too often leads owners to see selling the land as ‘the only option for easing the pressure.’<sup>90</sup> We also noted in chapter 5 the effect of current rating law and practice on papakāinga housing, the development of which is considered by hapū to be of great importance now and for the future. Indeed, many of the aspects of the mid- and late twentieth century rating regime have had impacts in the economic and social dimensions of Māori life.

#### **(4) Local planning legislation**

As previous chapters have shown, the pre-1977 lack of legislative protection in the planning process seriously affected tribal land and resources at a time when rural Māori communities near the town of Tauranga (which attained city status in 1963) were increasingly surrounded by commercial and housing developments. Case studies in chapter 5 showed how rural Māori land near the town boundary was rezoned and included in the urban area, before being subdivided for housing or commercial development.

Despite the welcome introduction of marae community zones and the like, claimants revealed that Tauranga Māori still, all too often, feel that they are being overwhelmed by the seemingly inexorable march of urban development. Antoine Coffin memorably referred to urbanisation as ‘Te Wheke o te Pakeha, the octopus with its tentacles eating up the land’, a metaphor to describe the ‘aggressive and relentless pressure’ faced by Ngāti Kāhu as a result of urban expansion.<sup>91</sup> Tawharangi Nuku, of Ngāti Hangarau, speaking of urban encroachment at Bethlehem, observed that: ‘Councils need to be cognisant of the cultural impact of development on our hapu and its identity. They have allowed our whanaunga to be swamped by the urban sprawl which has created such mamae.’<sup>92</sup> Zoning changes from rural to residential, especially as they affect Māori by causing increased rates, are still a threat as the district’s urban growth continues.

The negative impact on Tauranga Māori of the laws and policies we have reviewed here is not hard to discern. While Māori society benefited in many ways from the economic and social opportunities opened up by the remarkable development of Tauranga City, its port, and its prosperous rural surroundings, the price was increased pressure on Māori

90. Rahera Ohia, brief of evidence, 27 May 2006 (doc Q20), p 6

91. Antoine Coffin, brief of evidence, 26 June 2006 (doc R23(a)), p 10

92. Tawharangi Anthony Nuku, brief of evidence, 26 June 2006 (doc R22), pp 4, 6

landholdings and the social framework they supported. In the metaphor employed by counsel for Ngāti Hinerangi:

The rising tide of Tauranga's prosperity did not lift all boats, or at least, it didn't lift them all equitably. The consequence is that those who contributed so much of the resources on which Tauranga's prosperity has been based have not enjoyed a fair share of the resulting development and economic outcomes.<sup>93</sup>

#### 9.5 THE CROWN'S RESPONSE TO LANDLESSNESS

We turn now to a question posed in the statement of issues for this inquiry:

What were the obligations of the Crown with respect to hapū who have been left with little or no land? Did the Crown have an obligation to restore land to those hapū and/or facilitate their economic development in any other ways?<sup>94</sup>

In this section, we review the situation of several hapū who were left virtually landless in 1886, and inquire into the Crown's response to their plight.

The Tauranga stage 1 report established that the comparatively small amount of land left in Māori ownership after 1886 was 'not sufficient for the economic advancement of Tauranga hapu, let alone enough to ensure a relative degree of prosperity' – especially given its quality and the problems associated with multiple ownership.<sup>95</sup> But the Tribunal concluded that while 'all hapu of Tauranga Moana were prejudicially affected in substantial ways' by land loss occasioned by confiscation and its aftermath, some were more adversely affected than others – including Waitaha and several Ngāti Ranginui hapū (especially Ngāi Tamarāwaho and Ngāti Hangarau, whose core territories had been situated mostly within the confiscated block).<sup>96</sup> In this section, we examine what happened to the affected hapū in subsequent years.

##### 9.5.1 Hapū attempt to address their plight

We have examined land alienation in chapter 2, but we have not so far discussed the immediate impacts of landlessness or near landlessness. It was not long into the post-1886 period before hapū suffering the effects of land loss began approaching Government. Ngāi Tamarāwaho and Ngāti Hangarau both found themselves in this situation. After the raupatu, each hapū had been allocated some land in the hills and a much smaller area on the flat,

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93. Document U24, p 31

94. Paper 2.612, p 18

95. Waitangi Tribunal, *Te Raupatu o Tauranga Moana*, p 364

96. Ibid, pp 42, 231, 291, 307, 365, 405

near the harbour. In the new economic environment, coastal land was much more useful, being more easily farmable and closer to town. However, the areas they had were insufficient to support the whole hapū. Ngāi Tamarāwaho tried petitioning the Crown for a small additional block on which they could grow food ‘for our school children and for ourselves, because the portion that we now occupy is very small.’<sup>97</sup> The Crown land they were requesting was not available (it had been promised to the Agricultural and Pastoral Association), but more requests followed. The third request, in 1895, resulted in an investigation, but no suitable Crown land was found.<sup>98</sup> The Surveyor-General noted that while very short of land near the harbour, the hapū at Hūria had ‘plenty of land of their own in other parts.’<sup>99</sup> Morehu Rahipere, born in 1927, recalls her parents’ experience of the resultant need to continue with a more traditional and subsistence lifestyle:

My parents commuted backwards and forwards between Huria and the Taumata for many years, responding to the seasonal imperatives. They would be up at the Taumata when the pigeons were fat and the berries were ripe, and they would come down to the coast when it was time for planting kai, to gather kaimoana and to fish.<sup>100</sup>

In chapter 2, we also mentioned Ngāti Hangarau’s efforts to secure an area of native reserve at Ōtūmoetai. When that failed, they tried to exchange a large part of their hilly bushclad land for a much smaller area on the coast, first approaching a private landowner and then the Crown. It was to no avail. Although the Surveyor-General, S Percy Smith, wrote a sympathetic comment about Ngāti Hangarau on the file in 1898 – ‘they are essentially a sea-side people and have only enough land there to *starve* on’ [emphasis in original] – there was no acknowledgement that the Government was even partially responsible for their plight.<sup>101</sup> The most that could be considered was, as noted by an official on the file, that the landless natives legislation that was being discussed at the time might ‘meet such cases as this.’<sup>102</sup>

### 9.5.2 The Government’s response to Māori landlessness in the early twentieth century

The Government had first begun investigating Māori landlessness in the late nineteenth century, in the South Island.<sup>103</sup> In 1898, legislation formalising the allocation of Crown lands

97. Rauheha Paraone and others to Native Minister, 6 November 1891 (doc A38(e), p 1565)

98. Document A38, pp 36–38

99. Surveyor-General to Minister of Lands, 18 February 1895 (doc A38(e), p 1545)

100. Morehu Ngatoko Rahipere, brief of evidence, undated (doc F17), p 3

101. Document A38, pp 32–35; see also doc D5, pp 39–50. The Surveyor-General’s minute (3 December 1898) is on a letter from Te Mete Raukawa to Native Minister, 15 November 1898 (doc A38(b), p 450).

102. Under-secretary, Justice Department, minute, 8 August 1898 (doc A38(b), p 461)

103. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 3, ch 20; Waitangi Tribunal, *Te Tau Ihu o Te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 2, pp 658–665, 672



for the relief of landless Māori there was introduced to Parliament.<sup>104</sup> The Bill lapsed, but the intention to pass a landless natives Act remained. In the meantime, the problem of Māori landlessness continued to be aired at the highest level, and the discussion was widened to include North Island Māori. In Parliament in 1898, Henare Kaihau, the member for Western Māori (whose electorate included Tauranga), asked the Native Minister, Richard Seddon, whether provision could be made for members of North Island iwi who had suffered from losing their land through unjust confiscation. The Minister replied that such relief could be considered, but not before the situation of these people was subject to the same careful consideration as those South Island Māori currently being assisted.<sup>105</sup>

It was in this context that a list of 3549 Māori who had lost land through confiscation in the Waikato, Thames Valley, and Tauranga districts was prepared at Wāhi, in the Waikato, by the Kīngitanga. Dated 22 May 1900, the document was soon made available to Parliament, being 'laid on the table' by the Prime Minister (Seddon) and subsequently printed.<sup>106</sup> The list included the names of at least 300 people identified as belonging to Tauranga iwi. Of these names, 66 appeared as Ngāti Hangarau, with Te Mete Raukawa listed first. According to claimant evidence in our inquiry, 59 of the people listed as belonging to the 'Ngatitupu hapu of Ngatiranginui' were Ngāi Tamarāwaho.<sup>107</sup>

Soon after the document was tabled, the member for Northern Māori, Hone Heke, asked the Native Minister whether he would ascertain the names of all Māori in the North Island who had been rendered landless by confiscation (and also by the Crown's claiming of 'surplus lands' in his own district of Northland). Heke hoped that the Government would be able to do something for such people. James Carroll, who by now had succeeded Seddon as Native Minister, assured his questioner that it was the intention of the Government to make inquiries throughout the country and ascertain as correctly as possible the number of Māori made landless 'through the unfortunate circumstances referred to'. He affirmed the Government's belief that 'it was the duty of the State to remedy such grievances'. It was known that there were people in that situation, and the Government intended 'to seriously go into the matter, and remedy what they considered an undesirable condition of affairs'.<sup>108</sup> Asked what form the inquiry would take, Carroll said he was prepared to receive any list like the one recently laid upon the table, which was 'contributed by the Natives voluntarily', although, of course, verification by officials or Native Land Court judges would be necessary.<sup>109</sup>

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104. *Bills Thrown Out*, 1898, pp 325–328

105. 2 August 1898, NZPD, 1898, vol 102, pp 185–186

106. 'Landless Maoris in the Waikato, Thames Valley, and Tauranga Districts who Lost their Land by Confiscation', 22 May 1900, AJHR, G-1

107. Hazel Riseborough, 'Ngai Tamarawaho: Protectors of the Prophecy' (commissioned research report, Wellington: Crown Forestry Rental Trust, 1999) (doc F3), p 97

108. 28 September 1900, NZPD, 1900, vol 114, pp 361–362

109. Ibid

A year later, in 1901, the matter was raised in Parliament again, this time by Henare Kaihau. The Government was asked when it would fulfil its promise to provide for Māori made landless by confiscation in the Waikato and other districts. A royal commission should be appointed, and steps taken immediately to reserve Crown land for the purpose. Again Carroll acknowledged the Government's 'moral responsibility' in the matter. He was not willing to discuss the rights and wrongs of confiscation, and asserted that the present Government was 'not responsible for the errors of the past, or those that had been committed by previous Governments', but agreed that it was their 'duty' to consider the present condition of those affected and see how they could be assisted by providing land. Once again, he pointed to the necessity of a thorough investigation as had been done for the South Island, and stated that an official would be appointed to investigate the North Island claims and see what could be done. Allocations and legislation would follow. Kaihau was urged to be patient, since action was definitely being planned.<sup>110</sup>

Another year passed, and Kaihau asked if the promised official had been appointed. He told Parliament that it was essential for the Government to keep to what it had undertaken if discontent was to be allayed. Carroll replied that the Government was still intending to 'set up some form of tribunal' to inquire into North Island landlessness, but was now wondering if it might be best to use the Māori councils for this purpose.<sup>111</sup> Clearly nothing had been done, but the issue did not fade away. Representations were again made on behalf of Ngāti Hanganau in 1903, this time directly to the Prime Minister. Seddon's promise to have inquiries made, with a view to finding land that could be purchased 'at a reasonable price', did not lead anywhere. In 1905, when the Government was informed that some suitable land had become available for purchase by the Crown to meet the need of the hapū, the request was refused by officials on the grounds of cost and low priority.<sup>112</sup> In the words of the under-secretary of the Justice Department, which was responsible for Māori affairs at that time, 'there are no funds available for the purchase of the lands referred to – and so far as I can ascertain, Te Mete Raukawa's case has no more merits than that of hundreds of other natives who claim to have insufficient land'. The official also noted that Te Mete was in trouble for refusing to pay the dog tax to the local Māori council: for this reason it was 'inadvisable that he should be singled out for exceptionally favourable treatment at the present time.'<sup>113</sup>

In the meantime, the issue had been brought up again in Parliament. In 1904, Heke reminded the House that many Māori in the North Island had been made landless by the Crown's land acquisition methods, and also by confiscation arising from wars that were not of their own making. Heke declared that it was the Government's responsibility to provide

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110. 20 September 1901, NZPD, 1901, vol 118, pp 654–656

111. 20 August 1902, NZPD, 1902, vol 121, pp 489–490

112. Document A38, p 36

113. Under-secretary, Justice Department, minute, 19 May 1905 (doc A38(b), p 427)

land, and to act immediately. He referred approvingly to a recent statement by the Prime Minister that the Government was considering a ‘stock-taking’ of Māori land.<sup>114</sup> A few days later he asked whether the Government was indeed intending, by means of this ‘stock-taking’, to ascertain the number of landless Māori, categorise the causes of their landlessness (whether confiscation, the land laws, or the Northland ‘surplus land’ appropriations), and then set aside enough Crown land to support them. Carroll assured Parliament that ‘the whole question of landless natives, irrespective of the causes which brought them to that state, will be dealt with in connection with the stock-taking of Native lands referred to, and sufficient areas to cultivate and occupy will be provided for them.’<sup>115</sup>

The following month, Kaihau followed up with another question about whether legislation would be introduced. He also asked whether private land would be acquired if it became clear that there was not enough Crown land. Carroll simply replied that it was intended first to ‘have reliable information on the subject through some competent tribunal.’<sup>116</sup>

In 1906, Seddon died, and by then Kaihau and Heke had been joined in Parliament by Apirana Ngata. During debate on the Landless Natives Bill that would formalise the provision made for South Island Māori, Ngata warned that purchasing ‘surplus’ Māori lands in the North Island without first checking that it was indeed surplus could put North Island Māori in the same position as the landless Māori of the South Island, who had had to beg incessantly for their grievance to be addressed. He reminded Parliament that the late Prime Minister, Seddon, had promised that provision would be made for landless people in the Waikato.<sup>117</sup> Heke, too, seized the opportunity to commend the Government for making ‘some small compensation’ to South Island Māori, and said that landless Māori in the North Island, whose case had often been mentioned in Parliament, would welcome a statement of the Government’s intention for them. Carroll responded that the legislation being enacted at that time was responding to the recommendations of a commission concerned with the South Island; he hoped that investigations in the North Island would eventually advance enough for similar action to be taken there.<sup>118</sup> Later in the debate on the Landless Natives Bill, Heke again reminded Parliament about the North Island. ‘It seems to me’, he said, ‘to be not very well realised that there are thousands of Natives in the North Island who have been rendered landless by legislation passed by Parliament during the past Administrations, and also by policy measures initiated by past Governments.’ The Speaker stopped Heke by pointing out that the Bill applied only to the South Island.<sup>119</sup> The following day, Carroll again

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114. 5 August 1904, NZPD, 1904, vol 129, p 272

115. 17 August 1904, NZPD, 1904, vol 129, p 479

116. 21 September 1904, NZPD, 1904, vol 130, p 408

117. 4 September 1906, NZPD, 1906, vol 137, p 326

118. 21 September 1906, NZPD, 1906, vol 137, p 744

119. 2 October 1906, NZPD, 1906, vol 138, p 39

stated that the Government was considering how best to investigate the extent of North Island Māori landlessness.<sup>120</sup>

The plan to conduct a ‘stock-taking’ of Māori land in the North Island was implemented in the form of the Stout–Ngata commission of 1907, but the commissioners were not instructed to consider the question of Māori landlessness and how to address it; rather, they were to look at what land remained and how much of it should be retained by Māori. In Parliament in 1910, Kaihau returned to the issue of landlessness. He asked the Prime Minister, Joseph Ward, if the Government intended to introduce legislation, or set up a royal commission, or use any other method to effect Seddon’s earlier promise to provide land for landless Māori in the North Island. Ward referred to action taken in the nineteenth century, but Kaihau dismissed that as very limited. He insisted that the matter still needed addressing and was still a major grievance for those affected.<sup>121</sup>

### 9.5.3 Landless petitioners take up the cause

Kaihau’s parliamentary career ceased in 1911. From then on, the cause of landless Māori in the North Island was kept alive not by politicians but, as in earlier years, by petitioners from specific landless groups. In 1907, Te Rauhea Paraone and two others had petitioned Parliament for title to section 80, block X.<sup>122</sup> Located about a mile and a half (2.5 kilometres) from Hūria, this was an area of about 60 acres (24 hectares) where a section of Ngāi Tamarāwaho had settled after the wars. The land, known as Te Reti, was part of their traditional rohe but had somehow become officially regarded as unallocated Crown land. The Māori occupants had been asked to leave, and it was leased out to a Pākehā farmer. An inquiry was recommended by the Native Affairs Committee. The magistrate in Tauranga found that the land had indeed been granted in the 1870s to the forebears of the petitioners, and the outcome in 1911 was a grant of title to the evicted occupants. Many of their descendants still live there.<sup>123</sup> This acquisition brought some relief, but in 1915 the case of Ngāi Tamarāwaho was again put before the Government, through a petition from Mihiara Ratu and 105 others asking that the hapū ‘be granted some land, as they are landless’. In 1916, Parliament’s Native Affairs Committee referred the matter to the Government for favourable consideration, but this time it seems that nothing was done.<sup>124</sup> It was not many months after this that an official investigating another matter described the Hūria people as ‘easily the poorest natives in this District’.<sup>125</sup>

120. 3 October 1906, NZPD, 1906, vol138, p 81

121. 14 September 1910, NZPD, 1910, vol151, pp567, 574

122. Native Affairs Committee Report, Petition 259, 10 September 1907, AJHR, 1907, I-3, p 11

123. Document F3, pp 84, 107; David Matthews, brief of evidence, undated (doc F16), p 6; doc A15, p 11

124. Native Affairs Committee Report, Petition 401, 29 July 1916, AJHR, 1916, I-3, p 27

125. Clerk of court, Tauranga, to under-secretary, Native Department, 12 January 1918 (doc A38(b), p 716)

Another situation brought to the attention of the Government was that of Ngāti Makamaka, a hapū of Ngāi Te Rangi. Rotohiko Pakana's petition in 1920 stated that Ngāti Makamaka were descended from people whose land was confiscated. They were now landless, and were asking for a block of Crown land comprising 1050 acres. Pakana submitted a list of 40 landless Ngāti Makamaka who supported themselves by casual labour. Inquiries showed that they were mostly young adults who worked at timber mills, and wanted land to clear and farm. The chief surveyor, H M Skeet, was unwilling to accept Pakana's view of the ownership history of the land, and was unsympathetic to the request. Skeet warned Pakana 'not to expect a favourable reply as the Government were not in a position to give thousand acre blocks away just because any particular person happened to be landless', and recommended that the request be refused.<sup>126</sup>

Also in 1920, George Hall and nine others submitted a further petition on behalf of Ngāi Tamarāwaho, renewing its request for a grant of land. It said that only 100 acres had been returned to them and, owing to their increased numbers, many were now landless or had insufficient land to support them. Their petition was similarly dismissed by Skeet after he made some inquiries. He suggested that it probably reflected 'the present financial stringency', and that the Government did not have to assist applicants of this kind since their landlessness was often due simply to their having sold their holdings in the past. The Native Department told the Native Affairs Committee that it had no comment to make on the two petitions, since they raised matters concerned with policy.<sup>127</sup>

The Ngāi Tamarāwaho petitioners did not let the matter drop. They continued to press their case, and in 1927, their petition and that of Ngāti Makamaka were among several considered by the Sim commission. The commission's investigation into the landholdings of Ngāi Tamarāwaho concluded that 284 members of the hapū owned a total of 700 acres. The commission noted that succession to title in this land had resulted in shares as small as 1/70th in one block and 1/300th in another. Despite this recognition of Ngāi Tamarāwaho's diminished and divided landholdings, the commission did not recommend that they be granted Crown land. With regard to Ngāti Makamaka, the commission observed that the petitioners had not offered any evidence in support of the claim that they were now landless. The commission's report stated that this petition, like that of Ngāi Tamarāwaho, 'really raises the general question of policy – namely, whether or not the Government should undertake

126. Chief surveyor to under-secretary for Lands, 20 January 1920 (Waitangi Tribunal, Raupatu Document Bank, 139 vols (Wellington: Waitangi Tribunal, 1990), vol 51, pp 19,873–19,875); petition 154/20, 13 October 1921, AJHR, 1921–22, I-3, p 5

127. Chief Surveyor to under-secretary for Lands, 15 November 1921 (Raupatu Document Bank, vol 51, pp 19,877–19,878); Petition no 269/20 (Raupatu Document Bank, vol 138, pp 53,033–53,034); Petition 269/20, 13 October 1920, AJHR, 1921–22, I-3, p 5

to provide land for Natives who are landless. That is a question outside the scope of our inquiry, and we do not make any recommendation on the subject.<sup>128</sup>

Ngāi Tamarāwaho told the Native Minister in 1930 that, of all the hapū of Ngāti Ranginui and Ngāi Te Rangi, they owned the least land. They asserted that, if they were to wait till the Government had 'given birth to a policy for landless Natives', then 'the country owned by the Crown round our way would be all sold or taken up, [with] nothing left but barren rocks for us to gaze at'.<sup>129</sup> Their request for sections (under a deferred payment system) from rough Crown land adjoining their own hill block concluded with the declaration: 'We came from no mean stock, truly the confiscation played havoc with us'.<sup>130</sup> Again there was no favourable outcome.

The needs of Hūria Māori were put forward again in 1944, when Raniera Hiamoe and 90 others petitioned against the unjust confiscation of their ancestors' land. They stated that the descendants of the original landholders were now entirely landless, and they sought 'just compensation or the provision of land to meet the most desperate need of the Ngatamarawaho and Ngati Tapu sub tribe for living space'.<sup>131</sup> Also in 1944, a similar petition was submitted for Ngāi Tamarāwaho by Sam Kohu and 212 others, stating that 'we their descendants are practically landless and destitute'.<sup>132</sup> The Native Department was asked for information but did not make any comment on the two petitions, merely referring the Native Affairs Committee back to the findings of the Sim commission.<sup>133</sup> We note that by the early 1950s, the Ngāi Tamarāwaho community, then numbering around 275 people, was divided between three small settlements – Hūria, Te Reti, and Matahoroa – with the main one being Hūria.<sup>134</sup>

The Tauranga stage 1 report showed how these petitions were part of a wider effort by Ngāti Ranginui hapū to obtain a full inquiry into their raupatu claims.<sup>135</sup> Here, we are concerned particularly with landlessness and the fact that, while certain Tauranga Māori had petitioned the Government and the Legislature about their plight for half a century, successive officials and ministers failed to respond. In evidence presented to us, David Matthews, of Ngāi Tamarāwaho, recalled his hapū's history of protests and petitions:

128. W A Sim et al, 'Confiscated Native Lands and Other Grievances' (Report of the Royal Commission), 29 June 1927, AJHR, 1928, G-7, pp 29–30

129. G Hall to Native Minister, 17 October 1930 (doc A38(d), pp 1310–1312)

130. Ibid

131. Hiamoe and others, petition no 88/1944 (Raupatu Document Bank, vol 5, p 1887); 'Native Affairs Committee Report', Petition 88/44, 12 December 1944, AJHR, 1944, I-3, p 14

132. Kohu and others, petition no 89/1944 (Raupatu Document Bank, vol 5, p 1896); 'Native Affairs Committee Report', Petition 89/44, 29 November 1944, AJHR, 1944, I-3, p 10

133. Under-secretary, Native Department, to Native Affairs Committee, 23 November 1944 (Raupatu Document Bank, vol 138, pp 52,940–52,941)

134. Document A15, p 11

135. Waitangi Tribunal, *Te Raupatu o Tauranga Moana*, pp 367–380



We never gave up protesting against the injustice of the raupatu . . .

When I was young we had raupatu meetings which my mother ran. The meetings were for the purpose of organising our resources, financially and otherwise, to make claims to Parliament as regards our situation.

My uncle, George R Hall, was the main player. He was the Ngāi Tamarawaho scribe who wrote many letters to the Government appealing for land for our people . . . In his letters, he would tell of the *raupatu* and of Ngāi Tamarawaho being landless because of the confiscation. He told of how our people had no land and no way to grow crops, and how our standard of living had been lowered as a result. My uncle asked for consideration to be given to us by the Government, as a landless people who were suffering because battles had been fought on our lands . . .

Our petitions to the Government carried on for many years, not just through George Hall but others as well. My uncles, Peri Kohu and Nepia Kohu, and my father all put petitions in. It was an ongoing protest really because of the stubbornness of the Government. Nine times out of ten our petitions were refused, but we kept going because we believed in the justice of our cause.<sup>136</sup>

#### 9.5.4 Conclusions

The Crown's failure to meet the needs of hapū that were landless (or nearly so) by offering land or providing other forms of development assistance not only resulted in economic hardship but also had negative social and cultural repercussions. David Matthews was one of several claimants whose evidence described these social and cultural impacts:

With the confiscation came the derogation of our people. Landless. Our people have always maintained that for a person to be of some standing in some way you must have land, turangawaewae. If you have land you are somebody, if not, you are nobody . . .

The loss of our land had a devastating effect on our people. We became downtrodden, economically defunct. The situation caused great anger and anguish for Ngāi Tamarawaho.<sup>137</sup>

The evidence of Vervies McCausland, of Waitaha, is another example. She spoke of the many implications of having little land, not all of them economic:

We have few tribal assets and resources to support our parents and help them to provide encouragement for their children. Dysfunctional families are evident. Many of our people have been undermined, ostracised and ignored so that their self-esteem has eroded to such an extent, they cannot pick themselves up let alone encourage their children to succeed.<sup>138</sup>

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136. Document F16, pp 6–7

137. Ibid, p 3

138. Vervies Punohu McCausland, brief of evidence, 27 September 2006 (doc s32), p 3

Speaking for Ngāti Te Pukuohākoma – a hapū of Waitaha but also with connections to Ngāti Pūkenga – Shane Ashby explained the significance of the fact that his hapū has no land or marae, saying: ‘We don’t feature on the radars of the local council or government agencies. Our lack of presence makes it difficult to protect our continuing cultural interests.’<sup>139</sup>

The situation of the ‘landless’ hapū described in this section was the outcome of confiscation and other Crown actions in the period before 1886. While measures were taken soon after that to assist landless Māori in other parts of the country, no such help was given to Tauranga Māori who had little or no land. Despite the petitions and other evidence put before the Government, the listing of landless people in 1900, and the advocacy of articulate leaders in Parliament and elsewhere, no policy for supporting Māori in this situation was approved or implemented in Tauranga. We will return to this in our analysis and findings, in section 9.8.3.

#### 9.6 PROVISION OF SERVICES

We have already observed in chapter 5 that local bodies were sometimes reluctant to provide services to Māori communities because they saw the level of Māori ratepaying as unsatisfactory. In some instances, a lack of services could affect health, living standards, and the viability and profitability of tribal lands – for example, when water supply improvements were denied or delayed. In this section, however, our focus is on central government’s provision of health, housing, and education services to Tauranga Māori, the adequacy and appropriateness of which was challenged by several claimants.

To assess the Crown’s provision of these services, it is necessary to understand the context in which they were provided – the different beliefs, political developments, and economic conditions that prevailed in different periods, and the interplay between evolving national policy and local factors in Tauranga Moana. Underlying all these matters is the fundamental issue of what level of services and support the Treaty obliged the Crown to provide to Tauranga Māori – did it fulfil or neglect these obligations? While we have sought to address these matters in some detail, we note again that we have at times been restricted by a lack of evidence.

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139. Shane Ashby, brief of evidence, 25 September 2006 (doc s28), p 3

**9.6.1 Health**

A causal relationship between socioeconomic conditions and health is well established. As Professor Durie has observed:

health status cannot be measured outside the socio-economic realities of Maori experience. There is abundant evidence that health is directly related to general standards of living as determined by employment, education, income levels, housing and household configurations . . .<sup>140</sup>

In assessing the nature and impact of Crown policies, actions, and omissions, we are conscious that health outcomes are determined not solely by medical intervention and the health services. In the period under examination, Crown health services could never, by themselves, bring about perfect health for all. Health status could be affected by many factors beyond the control of officials, including income, occupation, employment levels, education, and housing – not to mention individual lifestyle choices (which have an important bearing on health but are not very amenable to Treaty analysis). At the same time, official policies, programmes and practices undoubtedly have an impact on health conditions in the community, and these will be our focus here.

In essence, the claimants assert that the provision of health services by the Crown between 1886 and 2006 was inadequate, and that the policies implemented were not appropriate or culturally sensitive to Māori. In considering these claims, we ask what level of services the Crown was obliged to provide to Māori under the Treaty; whether the level of health services offered to Māori was equal to that offered to non-Māori; and whether those services were culturally appropriate for Māori.

**(1) Provision of health services to 1900**

We have already referred to evidence pointing to high rates of ill-health among Tauranga Māori in the late nineteenth century. It is well known that, after contact and colonisation began earlier in the century, Māori everywhere were severely affected by diseases that sprang from lack of immunity and rapidly changing social conditions. Extensive depopulation occurred, which in the 1880s showed no sign of improving.<sup>141</sup>

The facilities for medical assistance in the Tauranga district were somewhat rudimentary at that time, which was usually the case in the outlying regions of New Zealand. Doctors eventually set up practice in the town, but their services were expensive. A military hospital erected during the land wars, and used by both Pākehā and Māori, had closed by 1875; however, a 'Native Hostel' dating from the 1870s was sometimes used as a place to treat sick Māori. From the 1870s, Māori also had access to a native medical officer, a subsidised doctor appointed by the Government to treat those who could not pay for medical care themselves.

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<sup>140</sup>. Durie, p 138

<sup>141</sup>. Ibid, pp 28–36

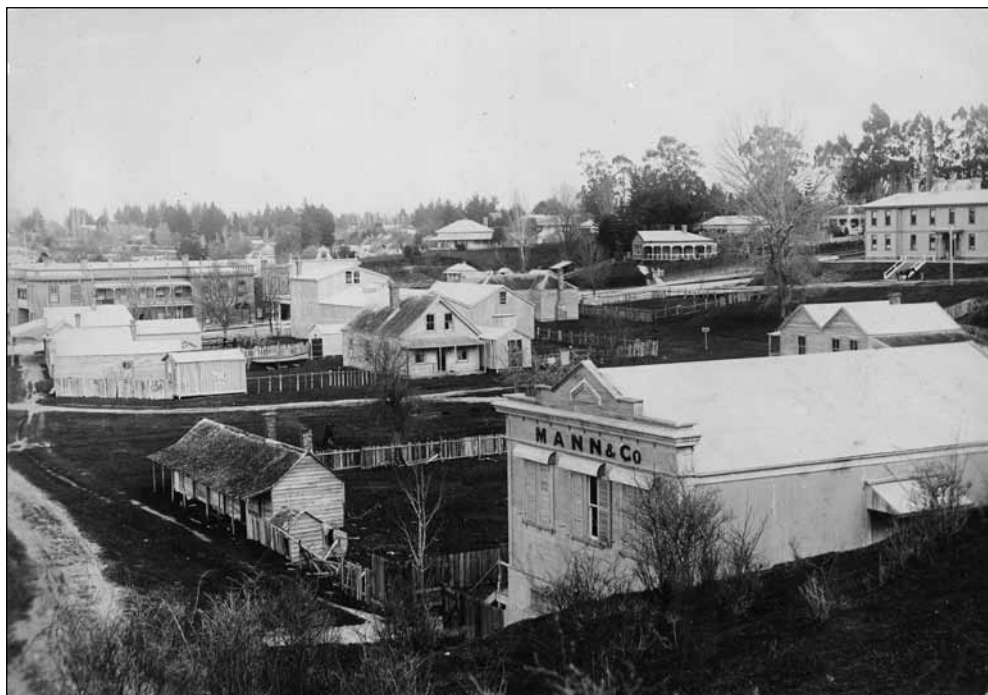


Figure 9.4: Tauranga township circa 1899, showing the 'Native Hostel' (wooden building, left foreground) established by the Government in 1878

Photographer unknown. Reproduced courtesy of Tauranga City Libraries (99–797).

This service was, of course, useful mainly to Māori living near Tauranga township, since it was difficult for sick people to travel long distances to town, and doctors' charges for home visits were very high.<sup>142</sup>

Across the country, the distribution of native medical officers varied according to the policies of successive governments. The Tauranga appointment may not have been continuous during the 1870s and 1880s, and in 1888 a retrenchment of Government services meant that subsidies for some native medical officers – including the one in Tauranga – were terminated. Press reports of untreated Māori sickness at Hairini revealed that the Government was no longer taking 'paternal care' of Māori who needed medical attention and there was 'great mortality' among them.<sup>143</sup> In one case, the father of a young woman there found that Māori could no longer call on the subsidised doctor.<sup>144</sup> It emerged that the doctor had been told that his annual payment, which he considered already small for a district stretching from Mercury Bay to Ōpōtiki, would be halved; he declined to accept the reduced subsidy, and the care of indigent Māori in Tauranga was entrusted to the Charitable Aid Board. As the *Bay of Plenty Times* commented, 'the Government will no longer aid them, and the

142. Document A38, pp 20,69

143. *Bay of Plenty Times*, 16 November 1888, p 2

144. *Ibid*, 21 November 1888, p 4

Charitable Aid Boards have not yet accepted the responsibility; meanwhile indigent natives, suffering from disease or illness, will have to seek aid from their friends.<sup>145</sup> After this change, there was no designated medical officer in the district, although visits by doctors were sometimes authorised and paid for by the Government, usually when there were particularly severe epidemics.

Hospitals in New Zealand were open to all, but for many years there were none in the Tauranga district. It was not until 1903 that a small institution was established in Waihi, and then in 1914 a hospital opened in Tauranga itself.<sup>146</sup> Until then, the closest hospitals were in Thames or Rotorua.<sup>147</sup>

The other source of health care for Māori in this period was the native schools. As elsewhere, native school teachers in the Tauranga district were supplied with simple medicines to dispense to their pupils (and sometimes also to the children's families). They taught basic principles of hygiene and nursing, and often attended to people affected by epidemics. Although they were not trained in health care, the teachers provided what might be regarded as basic frontline medical services for Māori. In Tauranga, after the native medical officer appointment was terminated in 1888, they were the only designated providers of medical care in the district's Māori communities.<sup>148</sup>

Reports written by teachers and native school inspectors supply evidence not only of the teachers' health work but also of the poverty and illness affecting Māori communities from 1886 to 1900. The reports from Hūria Native School, for example, highlight the link between landlessness, poverty, illness, poor educational attendance, and achievement. Food shortages and poor living conditions lowered the people's resistance to disease. In 1895, the teacher Mary Stewart was reporting that, owing to influenza and typhoid, the dead had lain exposed for several days within 50 yards of the school, with 'sick people lying all around.'<sup>149</sup> A doctor visited and gave Stewart medicines for distribution, but three months later she reported that the supply was exhausted. Over the next few years, the school continued to suffer from severe epidemics among pupils and their parents. Other native schools, including those at Maungatapu and Pāpāmoa, experienced similar problems, with severe illnesses and poor attendance taking their toll.<sup>150</sup>

The evidence available to our inquiry, then, indicates that in the period up to 1900, some Government medical assistance was available to Māori in Tauranga through the native school teachers and (until 1888) a subsidised medical practitioner. In the 1890s, ad hoc

145. *Bay of Plenty Times*, 26 November 1888, p 2

146. *Kai Tiaki*, vol VII, no 2 (April 1914), p 68; *AJHR*, 1914, H-31, p 87; Violet McMillan, 'The Growth of Tauranga', *Journal of the Tauranga Historical Society*, no 18 (December 1963), pp 12–13

147. Derek Dow, *Māori Health and Government Policy, 1840–1940* (Wellington: Victoria University Press, 1999), p 70. According to this source, Thames Hospital was established in 1869 (p 70), and the Rotorua sanatorium/hospital in 1886 (p 62).

148. Document A39, pp 14–19; doc A38, pp 51–52, 57–58, 60–61, 68–69

149. Head teacher, Hūria Native School, to Secretary for Education, 3 October 1895 (doc A38(c), p 1621)

150. Document A38, pp 53–66

attendance by doctors was sometimes provided by the Crown in response to requests from native school teachers and others, but in most cases of illness, fees for medical care were a probable deterrent. The military hospital of earlier days had closed, and no hospital facilities were available in the district. This relatively small provision of health care was made when Māori poverty and ill-health were widespread – a condition often noted in the reports of Government officials.

**(2) Provision of health services, 1900–45**

From 1900 to 1945, it became clear that the nineteenth century decline in the Māori population had ceased. In fact, the population increased enormously. The reversal of depopulation cannot be attributed solely to medical intervention, which had certainly not been extensive. A more significant factor was perhaps the development of biological resistance to the new infections that had done so much damage in the post-contact period.<sup>151</sup>

However, in the twentieth century, health services certainly began to play a larger part in the improvement of health conditions among Māori. Two pieces of legislation in 1900, the Public Health Act and the Māori Councils Act, were the first of several important initiatives in the Government's provision for Māori health. Of even more significance was the new system of universal health care introduced in the 1940s.

The establishment of Māori councils (whose functions included preventive health) represented both an increased Government response to Māori health needs, and new official attitudes towards Māori involvement in caring for their own health and environment. Tauranga's elected Māori council, covering the same area as our inquiry district, was established after a meeting at Whareroa in 1902. Two leading Tauranga Māori, Hori Ngatai and Hoani Taipari, had accompanied the Native Minister, Carroll, on visits to other Māori councils to find out how the system operated. Not long afterwards, meetings were held in Tauranga with Carroll and the national native health officer. The Māori Councils Act was discussed, and the newspaper report of the meeting indicated that while a council was set up, there was opposition from those with 'a leaning towards the Maori King movement'.<sup>152</sup> It was reported in the press that the Tauranga Māori Council took a hand in promoting vaccination against smallpox, and in opposing a tohunga who brought alcohol into a settlement to aid his healing work.<sup>153</sup> We received very little information about the council's activities, but it is likely that, as well as being hindered by political divisions among Tauranga iwi, its potential for fostering progress in community health was (as with other Māori councils throughout the country) negated by its limited powers and lack of Government support.<sup>154</sup>

151. Ian Pool, *Tē Iwi Māori: a New Zealand Population; Past, Present and Projected* (Auckland: Auckland University Press, 1991), pp 101, 105, 109–110, 235

152. *Bay of Plenty Times*, 2 May 1902, p 2; 9 May 1902, p 2

153. *Bay of Plenty Times*, 30 September 1903, p 2; 22 February 1904, p 2

154. Raeburn Lange, *A Limited Measure of Local Self-Government: Māori Councils, 1900–1920*, Rangitiratanga Series 2 (Wellington: Victoria University of Wellington, 2004), ch 3



The other significant development of 1900 was the creation of a Māori health section in the new Department of Public Health. The first native health officer, Dr Maui Pomare, worked to improve Māori public health throughout the country and visited countless communities, including those in Tauranga. Native sanitary inspectors worked under his supervision, including one responsible for the Tauranga Māori Council District. Raureti Mokonuiarangi, who held this position from 1904 to 1909, was also designated for the Tongariro and Arawa Māori Council Districts; he was chairman of the Arawa Māori Council and, like his successor, a member of the Arawa iwi Ngāti Rangitahi. The evidence indicates that he did not devote much attention to Tauranga, but in any case the inspectors had all been laid off by 1912.<sup>155</sup>

Elsewhere in the country, the subsidisation of general practitioners to treat ‘indigent Maori’ continued, but this did not assist Tauranga whose native medical officer appointment had ceased in 1888. The consequent plight of Tauranga Māori was brought directly to the attention of the Prime Minister, Seddon, when he visited the district in 1905. He was told that the current situation, in which officials had to obtain authority from Wellington before engaging a doctor to attend sick Māori, was not satisfactory. Seddon instructed administrators in Wellington to look into arranging a subsidy.<sup>156</sup> According to Rose, however, it was another three years before one of the doctors in Tauranga agreed to the terms and was given an annual subsidy of £60 to provide Māori with medical services.<sup>157</sup> It is not known for how many years native medical officers were made available in this way in the district, but the Health Department increasingly regarded the system as unsatisfactory. In 1940, the possibility of appointing salaried full-time doctors to serve areas where many Māori lived was considered, and Tauranga was one of the places suggested for such an appointment.<sup>158</sup> But when the nationwide system of universal medical benefits under the Social Security Act was implemented in 1941, the financial barrier against consulting doctors was largely removed.

An important development in Māori health services in the early part of the century was the appointment of native health nurses. The first such nurse in the Bay of Plenty began work in 1913. Although she was based in Whakatāne, she dealt with epidemics across the region, including a typhoid outbreak on Matakana Island. It was noted at the time that this area was too large to be adequately serviced by one person, and in 1914 an appointment was made specifically for Tauranga.<sup>159</sup> Further information about this service, the forerunner of today’s Public Health Nursing service, was not available to us as far as Tauranga is concerned, but in other places it brought acknowledged benefits to Māori. The Director of the

155. Raeburn Lange, *May the People Live: A History of Māori Health Development, 1900–1920* (Auckland: Auckland University Press, 1999), pp 205–216.

156. Prime Minister to Native Minister, 3 April 1905, and following correspondence (doc A38(b), pp 515–527)

157. Document A38, p 91

158. Dow, pp 181–182

159. ‘Public Health and Hospitals and Charitable Aid’, 1913, AJHR, 1913, H-31, p 65; 1914, AJHR, 1914, H-31, pp 7–8; *Kai Tiaki*, vol VII, no 1 (January 1914), p 47

Division of Māori Hygiene, Peter Buck (Te Rangi Hiroa), wrote in 1920 that the work of the nurses was 'one of the most important branches' of the Māori health service:

They see patients at their headquarters and visit the schools and villages in their districts. By health lectures and practical instructions the preventive part of their work is as important as the actual nursing of cases. In epidemics their services are invaluable, and have saved Hospital Boards much worry and expense. In typhoid cases where it is difficult to transport Maori patients to hospitals they have started camps in the affected villages and nursed cases throughout. Not only has this got over the repugnance of Maoris against entering hospital and parting from their relatives, but it is hoped that the general routine with regard to nursing, feeding, and disposal of excreta, &c, will prove of great educational value to the people. The Maoris realise and appreciate the good work being done by the nurses, and many districts are asking for nurses to be appointed . . . I consider the nursing branch of the Maori work the one that should be assisted and pushed on more than any others.<sup>160</sup>

On another occasion, he wrote, 'In view of the importance of the work our nurses are doing, under many difficulties, I have no hesitation in stating that no other service would be more sadly missed than that of our nursing service amongst the Natives.'<sup>161</sup>

Secondary health services were late to reach Tauranga. As we have said, there was no hospital in the district until 1914. However, a Bay of Plenty Hospital and Charitable Aid Board had been established under the Hospitals and Charitable Institutions Act of 1885. The board was responsible for paying hospital fees where people could not meet the cost themselves and, in the absence of a hospital in Tauranga, applications could be made to cover the cost of seeking treatment in other urban centres. In Tauranga and in other places, the local board was sometimes asked to pay for the treatment of indigent Māori, but this was not welcomed by board members, who considered themselves responsible for ratepaying settlers only.<sup>162</sup> Hospitals at this time were funded only partly by the Government, with the remaining costs being met from private subscriptions, donations, patients' fees, and local body contributions. The latter category of income came from levies on the territorial authorities, determined by the rateable capital value of lands within their districts.

We heard evidence that Tauranga Māori did not have equal access to the available hospital health services because local authorities were reluctant to assist people they considered did not bear a fair share of the burden of ratepaying. We were told about Father Van Dijk, a Catholic priest, who wrote to the Native Department in 1905 seeking reimbursement for the cost of a cataract operation recently performed in Auckland Hospital on a Māori from Tauranga. Van Dijk had been forced to pay for the operation himself, because an application

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160. 'Public Health and Hospitals and Charitable Aid', 1920, AJHR, 1923, H-31, p 44

161. 'Department of Health: Annual Report of Director-General of Health', 1923, AJHR, 1923, H-31, p 44

162. Document A38, pp 48, 69

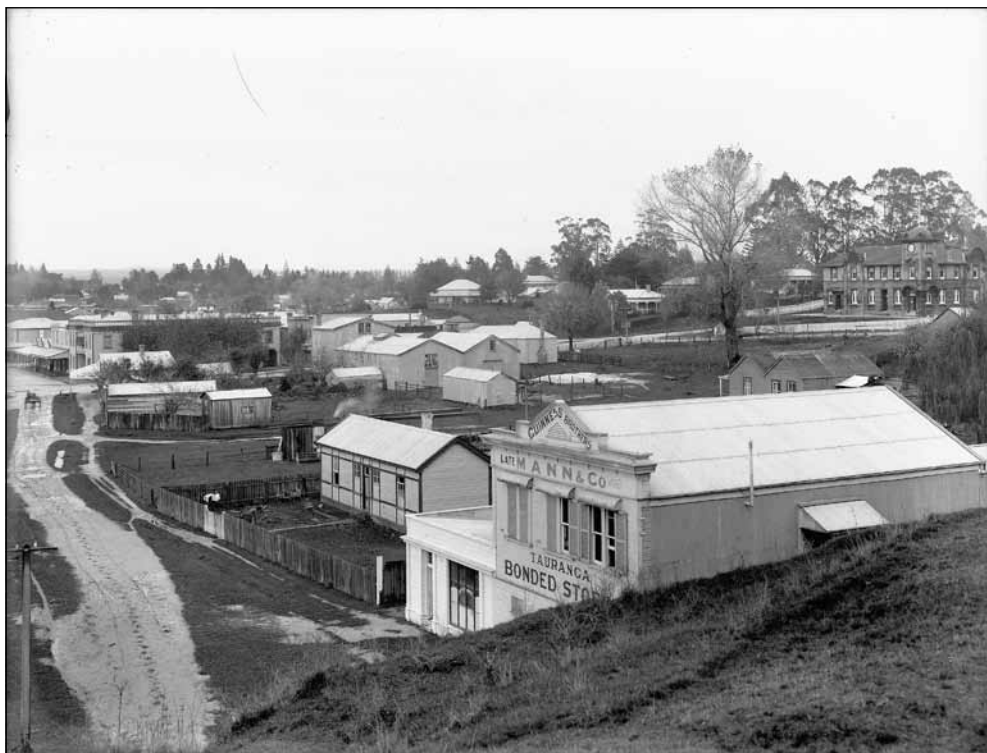


Figure 9.5: Tauranga township circa 1910 showing the new 'Native Hostel' that replaced the original building in 1903. It was often used by Māori who came to town for medical care, and was still standing in the 1950s.

Photographer unknown. Reproduced courtesy of The Press (Christchurch) Collection, Alexander Turnbull Library (G-017644-1/1).

to the Bay of Plenty Hospital and Charitable Aid Board was declined on the grounds that Māori did not pay rates. After some persistence, the department eventually reimbursed the priest but reproved him for incurring the liability, pointing out that in fact the local Hospital and Charitable Aid Board should have been responsible for the expense.<sup>163</sup> Another case concerned assistance for a disabled Māori from Rangiwaea Island. The Anglican clergyman who approached the Government for help commented: 'I would apply to the Charitable and Hospital Board, but they always reply that that is for pakehas only.'<sup>164</sup> The attitude of the board was criticised by the native health officer, Dr Pomare, who met the chairman in 1911 and reminded him that as ratepayers and taxpayers Māori 'should enjoy the same privileges as the Pakehas'.<sup>165</sup> The local authorities' view that national government, not them, was responsible for Māori health was clearly connected to the fact that a large part of hospital and other local health services was funded by rates – and, as we saw in chapter 5 (section 5.4.3),

163. G W Van Dijk to Native Minister, 27 October 1905, and following correspondence (doc A38(b), pp 511–514)

164. W Goodyear to Native Minister, 10 April 1910 (doc A38(b), p 544)

165. Native health officer to under-secretary, Native Department, 24 March 1911 (doc A38(b), p 556)

the mechanics of rate collection on Māori land was something of a headache for local authorities at the time.

There is also evidence suggesting that Tauranga Māori did not enjoy equal access to hospital facilities even after Tauranga's own hospital was built in 1914. The 'Native Hostel' (rebuilt in 1903) was still being used by Māori who came to town for medical care in the 1920s and 1930s.<sup>166</sup> At the same time, Tauranga Hospital was gradually increasing in size, and was completely rebuilt in 1926, while a small maternity hospital was opened in Katikati in 1921.<sup>167</sup> Māori admissions to hospital did occur, although we have no figures for this. It should also be noted that in this period, Māori were often unwilling to enter hospitals. The medical officer of health in Auckland reported reluctance of this kind when he came to deal with a typhoid outbreak in Matapihi in 1930: 'The Natives have a strong antipathy to entering a hospital for treatment, and considerable difficulty was experienced in this instance in persuading them to go.'<sup>168</sup> At the same time, however, the hospital board frequently complained that the income from Māori rates was insufficient and that Māori patients' fees were not always paid.

Throughout the 1920s and 1930s, the issue of Māori access to hospitals was brought up again and again by the governing bodies of these institutions. In 1924, the Tauranga Hospital Board (which had been created when the original Bay of Plenty Board's area was divided in 1918), was involved in a Hospital Boards Association approach to the Government. The association requested special subsidies to be paid to boards in Māori-populated areas 'and in whose district the Native-rates question is acute.'<sup>169</sup> At the end of the 1930s, local authorities were providing about 40 per cent of hospital income nationwide, with about 20 per cent coming from patients' fees and the rest from Government subsidies (based on complicated calculations related to rateable property).<sup>170</sup> No solution was found for the problems posed by unpaid fees and uncollected rates until the advent of Social Security hospital benefits in 1939 (which did away with admission fees), and the State's acceptance of hospitals' full operating expenses in 1957.

The issue of Māori access to hospital services was exacerbated by fear of typhoid contagion. Although this serious disease had long affected communities all over the country, Māori still suffered from it long after it became less common among Pākehā. There were epidemics in the Tauranga district in 1911, 1912, 1914, and 1915.<sup>171</sup> Typhoid inoculation programmes commenced in the early 1920s, but outbreaks still occurred. Environmental

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166. Document A38, pp 123–126

167. McMillan, p 14

168. Medical officer of health, Auckland, annual report on the North Auckland and Thames–Tauranga health districts, 1930–1931 (doc A39(a), p 330)

169. Conference of Delegates of Hospital Boards, 7 October 1924 (Dow, p 163)

170. P Fraser, 'Department of Health: Annual Report of the Director-General of Health', 1938, AJHR, 1938, H-31, pp 70–71

171. Document A38, pp 98–99

deficiencies played a part in this. Pomare had drawn attention to the connection between infected water supplies and typhoid epidemics in 1903, but we saw no evidence to indicate that Government departments helped improve water supplies in Māori settlements in Tauranga before 1920.<sup>172</sup>

In 1917, after recurring typhoid outbreaks at Hūria, there was an investigation into the need for a water supply there and whether a Government subsidy could be obtained. But the scheme did not proceed, largely because of disputes between the county and borough councils, and because of fears that it would be difficult to collect water rates from the Māori users.<sup>173</sup> In 1926, Hūria still lacked a supply of uncontaminated water. Although the county council had provided reticulation to within 15 chains (300 metres) of the site, it was reluctant to connect the settlement. A Government subsidy was eventually arranged to help the Hūria people provide their own water supply. A bore was sunk and water was piped to the houses, but by 1936 further improvements were needed. Again there were delays as the Native Department, the Health Department, and the local council argued over their respective contributions to the project. In 1937, with the help of funds raised by a village committee, the improvements were finally made and Hūria was connected to the borough water supply.<sup>174</sup> Greater official commitment to providing good water supplies might have been expected, but delays were often due (as in this case) to conflict over who was responsible for financing improvements. Nearby Matahoroa is another example of delays: discussions about Government subsidies and contributions from the local people for a water supply project there lasted for several years in the 1930s.<sup>175</sup>

Typhoid outbreaks continued to afflict Tauranga Māori communities throughout the 1920s and 1930s. Between June and November 1924, there were 21 cases of typhoid, including four fatalities, among Māori in the Tauranga area.<sup>176</sup> In 1925, the Tauranga Hospital Board told the Health Department that Māori typhoid patients should be nursed in their own settlements; at its meeting, a member had argued that it was the responsibility of the Government, not the board, to care for the health of the district's large Māori population.<sup>177</sup> The hospitalisation of Matapihi typhoid patients in 1930 led to a request to central government that the local bodies be reimbursed, since they were 'not in receipt of any revenue from the Natives'; another similar request was made in 1936.<sup>178</sup>

Pākehā fears of contagion had earlier prompted the Tauranga Hospital Board to campaign for more Government attention to living conditions in Māori communities. The

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172. Ibid, p 99

173. Ibid, pp 99–100

174. Document A39, p 27; doc A38, pp 132–134

175. Document A38, pp 130–132

176. Ibid, p 129

177. Document A39, p 128

178. Document A38, p 128

1918 influenza epidemic drew attention to the state of sanitation in the settlements, and in February 1919 the board prepared a resolution on the matter:

That this Board is unanimously of opinion that a number of native pas are of such an insanitary state as to be practically hotbeds of disease and a menace to public health. All kinds of infectious diseases are generated in these localities and spread broadcast through various towns in the vicinity. We would therefore request that a thorough inspection of these pas be made and an adequate sanitary system be inaugurated, otherwise the work of the inspectors is practically useless. We believe that a movement is on foot to clear up the slum portions of the cities. We would therefore ask that the native village be also taken into consideration in order to reduce the menace to country towns, which suffer annually from the insanitary conditions prevailing. Also that this be a circular letter to other Hospital Boards and local bodies affected and to the Royal Commission recently set up by the Government.<sup>179</sup>

The resolution was endorsed by most of the other boards and councils, and forwarded to the Government. This national effort helped bring about the reinstatement of a Māori section in the Health Department, with Dr Peter Buck (Te Rangi Hiroa) appointed Director of the Division of Māori Hygiene in 1920.<sup>180</sup> In Tauranga as elsewhere, the Native Health Nursing scheme was expanded, the Māori councils were revived, and closer attention was paid to Māori health matters. For a while, the renewed Tauranga Māori Council was relatively energetic in the health field, its most notable efforts being the provision of funds for water supplies at Hūria and Tahuwhakatiki. But later the council became inactive; Rose attributes this to a lack of Government funding, and also to the rise of the Ratana movement in Tauranga.<sup>181</sup>

After 1935, the first Labour Government extended the State's provision for Māori public health, including campaigns against tuberculosis (TB) and typhoid fever. It also implemented a scheme for housing improvement (to be discussed in the next section). Between the First and Second World Wars, the Health Department began programmes for improving maternal, infant and child health, and established a school dental service. Māori were included in all this provision, although we were given little information about the operation of the programmes in Tauranga.

The period between 1900 and 1945 thus saw the Crown make some commendable efforts to improve Māori health. On the other hand, there was no subsidised general practitioner service for Māori until 1909, and even after that date, access to medical care was not altogether adequate – at least until universal medical benefits were introduced under Social

179. Secretary, Tauranga Hospital and Charitable Aid Board, to all Hospital Boards etc, 13 February 1919 (doc A39(a), p 201)

180. Document A39, p 25

181. Document A38, pp 120–122



Security. There was no hospital in Tauranga until 1914, and the unsatisfactory funding basis for hospitals affected Māori access to this service when it did become available. Conflict between the various Government departments and the local authorities over funding and lines of responsibility reduced the effectiveness of health services. It was difficult to obtain financial assistance for water supplies and other facilities likely to improve standards of health. In addition, little acknowledgement of Māori practices or values is evident in the documented history of health services in this period. Takuwai Mason referred to this when she spoke about the lack of any provision for returning a baby's pito (umbilical cord) and whenua (placenta) to the family for burial in Papatūānuku (mother earth).<sup>182</sup>

### (3) *Provision of health services after 1945*

After the Second World War, the health status of Māori in New Zealand as a whole became more fully and accurately known. Great improvements occurred over this period. Looking at TB, the figures in 1940 showed a very large national disparity between Māori and Pākehā: the crude Māori TB death rate was 41.32 per 10,000 people, compared to the Pākehā rate of 3.88.<sup>183</sup> By 1947, despite an extensive control programme being put in place, the disparity had not been reduced and TB was the highest single cause of death among Māori.<sup>184</sup> But from the late 1940s, the national Māori TB death rate began falling – first to 11.08 per 10,000 people in 1951 and then to 6.36 in 1953. 'In six years,' stated the Health Department's annual report in 1954, 'the reduction in tuberculosis deaths has been greater than 50 per cent. The Maori death rate is still high, but the ratio of Maori to European deaths is steadily decreasing.'<sup>185</sup> In 1961, when the national TB mortality rate was 5.0 per 100,000 (Māori 18.8, Pākehā 4.0), the department declared that 'tuberculosis can no longer be considered as an important cause of death.'<sup>186</sup> As Professor Pool points out, the greatest decline in Māori TB mortality took place before new drug therapies became available.<sup>187</sup> The control programme played an important part in this.

Nevertheless, despite many important advances in Māori health in the second half of the century, disparities between Māori and non-Māori health persisted – and still exist. As Professor Durie put it in 1998, the changes in Māori health since 1900 were:

remarkable in terms of Maori survival and population growth. Not only did the population increase by over ten times and life expectancy nearly double, but mortality rates plummeted and infectious diseases no longer threatened to destroy whole communities. By 1975 tuberculosis had been brought under control and nearly eradicated, Maori infant mortality

182. Takuwai Christina Faith Mason, brief of evidence, undated (doc F23), p 5

183. A H Nordmeyer, 'Department of Health: Annual Report of the Director-General', 1941, AJHR, 1941, H-31, p 5

184. MB Howard, 'Department of Health: Annual Report of the Director-General', 1947, AJHR, 1947, H-31, p 35; 1948, H-31, p 4

185. J R Marshall, 'Department of Health: Annual Report of the Director-General', 1954, AJHR, 1954, H-31, p 82

186. 'Report of the Department of Health', 1961, AJHR, 1961, H-31, pp 20, 111

187. Pool, p 149

rates reduced from over 105 per 1000 to less than 30, and maternal deaths due to the effects of pregnancy and childbirth dropped from 7 per 1000 live births to less than 0.3.<sup>188</sup>

But, as Durie goes on to explain, new threats to Māori health had emerged – heart disease, cancer, mental illness, and other conditions ‘attributable to the major social and economic changes that had impacted heavily on Maori’ – and there was a continuing gap between Māori and non-Māori.<sup>189</sup> Earlier in this chapter we referred to the most recent *Hauora* study (2007), which analyses the current national Māori health situation and the disparities between this and non-Māori health. As we said, we do not have the evidence to ascertain whether Māori health in Tauranga conformed to the national pattern, but we assume that it does not differ significantly from it.

As these national trends in Māori health emerged over the post-war period, in Tauranga itself the Māori population was increasing steadily and the pace of urban development accelerating. Residential, commercial, and industrial growth brought unwelcome new influences to bear on Māori health, such as pollution and the loss of customary food resources. In the course of this inquiry, we have heard abundant evidence from claimants about the negative health consequences – from shellfish poisoned and depleted by sewage outfall, to respiratory problems linked to kiwifruit spraying. Of course, urban growth also brought some health-related advantages, such as easier access to medical services.

Unfortunately, we were given little or no information about the health services (including primary, secondary, and public health) that the Crown provided for Tauranga Māori in the second half of the twentieth century. This left us unable to assess the claims that the services provided were inadequate. Nevertheless, we are mindful of what we were told by the claimants, and the dissatisfaction felt by many about Māori health conditions and the services available in this period.

Indeed, concerns about Māori health and the kind of health care available to Māori in Tauranga were increasingly voiced during the 1970s. Tangata whenua have since played an important role in improving both the nature and the effectiveness of Māori health services. John Ohia and Orewa Barrett-Ohia, of Ngāti Pūkenga, for example, became deeply concerned about the poor health and premature deaths of many Tauranga Māori in the late 1970s, when unemployment and health problems seemed to be increasing:

The worst thing about it is that there were no services that could adequately cater to Maori needs. Worse than that, many [services] couldn't see why they should do anything differently. Consequently we had low turnout by young Maori families to services such as the doctors, counselling services and so on.<sup>190</sup>

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188. Durie, p 61

189. Ibid

190. John Ohia and Orewa Barrett-Ohia, brief of evidence, 26 June 2006 (doc R37), p 6

TAURANGA MOANA, 1886–2006

9.6.1(3)

Believing that a health centre catering for Māori needs in a Māori way would be beneficial, in 1981 this couple set up one of the country's first marae-based health trusts, Whaioranga, at Whetū Marae in Ngāpeke. This was a time when 'health for Māori dealt with by Māori in a Māori setting' was an unfamiliar concept. While acknowledging the Government's assistance in setting up this significant and successful endeavour, the witnesses found that official help was limited:

Mostly we have had to do everything ourselves. On the whole we have found it very difficult to get such government assistance and there are always strings attached. The government has tended to only fund the projects or services that it considers are important. It has been difficult to persuade the government that we have a good idea of the problems our people are facing and what is needed.<sup>191</sup>

They also drew attention to the Crown's failure to deal with socioeconomic disparities in the post-war period:

The point is that a social 'gap' has developed between Maori and non-Maori and our experience tells us that the Crown is responsible for much of the gap. We don't think the Crown has done enough over the years to assist Maori in Tauranga and the 'gap' seemed to get worse and worse from the 1950s to the 1970s so it was up to us to try to solve the problems. The Crown has stepped in and helped, but it is a little late and assistance is not targeted to allow our people to fix their problems themselves in their own ways.<sup>192</sup>

These witnesses assured us that the Whaioranga Trust 'is going really well today' but still needed Government support. Whaioranga now operates in the city as well as at its original marae base, offering a wide range of services including general practice, counselling, community support, mental health care, drug and alcohol education, whānau support, and rongoā (traditional healing).

There are several other Māori health and social services providers in Tauranga Moana, reflecting the greater recognition in recent decades that health services provided 'by Māori for Māori' are needed. Generally they are characterised by community ownership, a governance structure not dominated by medical professionals, and a Māori framework for the way in which health and the delivery of health services are perceived. These Māori initiatives have been supported by the Crown, but claimant evidence indicated that even greater support is needed. In her evidence, Rawinia Haua, a trained nurse and the chief executive officer of the Whaioranga Trust, spoke of the interrelationship between health and other socioeconomic realities, and emphasised the need for more Government assistance for the trust's aim of reducing health disparities:

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191. Document R37, p10

192. Ibid, p11

The Trust deals with a lot of social problems experienced by Maori in our community, such as unemployment, overcrowding of homes, increased solo parents, isolation from their whanau as they have moved into Tauranga, and whanau being brought up dependent on benefits. Many of our whanau find it hard to get work and need training and parenting skills. We often operate as an ambulance at the bottom of the cliff. I would much rather that we worked at the top of the cliff to address and prevent these problems at an early stage. . . . The funding we get from the government is absolutely pathetic. The more people that come through our door the more attention that is required for them and the more money we need to assist them. The reality is, due to the demand and need of our customers, the workers tend to do more than what we are funded for.<sup>193</sup>

Another long-time supporter of the Whaioranga Trust, Tirikawa Ohia, explained why Māori-oriented services were needed, and emphasised the difficulties encountered in setting them up:

I think our people had to set up the hauora ourselves as the Pakeha system of health and also the education system just didn't work for Maori and wasn't designed for Maori. So we had to set it up ourselves and then fight the system to establish these things.<sup>194</sup>

Janis Smith, a coordinator for Ngāti Kāhu Hauora, described the work of this health provider and its 'tireless workers'. Inadequate funding, she said, still greatly hindered the organisation. 'Maori are still dependent on the European view of health', she observed. 'They are limited by Government funding resulting in minimal Maori health services in the primary and secondary [health care] sector.'<sup>195</sup> The belief of Beverley Flavell, of Ngāi Tamawhariua ki Rereatukahia, a health worker for more than forty years, is that it is only when Māori own, control, and deliver health services to their own people that improved health and social outcomes occur.<sup>196</sup>

These local Māori health developments took place in the context of an evolving policy change at national level, evident from the early 1980s. As part of its concern for 'at risk' groups, the Health Department took a favourable view of the development of Māori-based and Māori-directed health programmes.<sup>197</sup> Its annual report in 1984 explained that, because of concern about ethnic disparities in health, it had identified Māori health as one of its four priorities for the coming year (a decision that was confirmed in 1986 and 1987). The department's aim was 'to work more effectively with Maori people in ways which are acceptable to them to bring about health improvement'. This would include giving more recognition to 'different cultural perceptions of health and sickness, the use of health services, and the

193. Rawinia Haua, brief of evidence, 27 June 2006 (doc R39(a)), p 5

194. Tirikawa Ohia, brief of evidence, 26 June 2006 (doc R41), p 7

195. Janis Smith, brief of evidence, undated (doc D35), p 3

196. Document R9, pp 19–20

197. 'The Public Health: Report of the Department of Health', 31 March 1983, AJHR, 1983, E-10, p 18

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importance of preventive health care, as well as improving cross-cultural understanding between Māori and health care workers. 'Marae-based health schemes which take account of traditional Maori views about health and illness and incorporate Maori healing practices with western-style health care are beginning to emerge.'<sup>198</sup> In 1985, the department made important statements about the Crown's new bicultural approach. It confirmed that the Māori health programme recognised 'the holistic philosophy of health' embraced by Māori. Its statement continued:

Maori people want to be involved in decisions affecting their future development, and the department acknowledges that it is no longer appropriate to formulate intervention programmes without their involvement and participation. It perceives its role now as that of a partner, supporting initiatives, projects, and programmes developed by Maori people.<sup>199</sup>

Despite this, some claimants remain sceptical: Paul Stanley, who gave evidence for Ngāi Te Rangi and spoke from his experience in health and social welfare, thought that the commitment of the Crown to Māori health development in Tauranga Moana even now remains questionable.<sup>200</sup>

**(4) Conclusions**

Despite the lack of detailed information about the provision of health services in Tauranga since the late nineteenth century, and especially in the period since 1945, it is clear to us that Māori in this district were by no means excluded from the Crown's national health care programme. Whether this programme operated effectively for Māori in Tauranga Moana is another matter, which (despite a shortage of evidence) we will evaluate as best we can in section 9.8. It is also clear to us that while considerable improvements in Māori health occurred in this period – in life expectancy, the overall mortality rate, infant mortality, and the morbidity and mortality rates for individual diseases (especially TB) – non-communicable diseases emerged as a huge health problem. Moreover, there have been large disparities between the health status of Māori and that of non-Māori, many stubbornly persisting until today.

We also saw evidence that the Crown increasingly recognised the need for a health policy that took Māori needs and wishes into account. Pushed to a considerable degree by Māori themselves, such as those who strove to establish organisations like Tauranga's Whaioranga Trust, the Crown's health agencies increasingly acknowledged Māori-oriented health care principles. It is clear that the Crown's Māori health policy has moved far since the 1970s. As Charlotte Williams puts it in her recent study of this topic:

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198. 'The Public Health: Report of the Department of Health', 31 March 1984, AJHR, 1984, E-10, p 23

199. 'The Public Health: Report of the Department of Health', 31 March 1985, AJHR, 1984–1985, E-10, pp 5–6

200. Paul Stanley, brief of evidence, 26 June 2006 (doc R24), pp 14, 19

In the ten years from the early 1980s there had been substantial progress in injecting a Maori perspective into health policy and operations . . . During this period the Crown had been increasingly supportive of Maori desires for greater equity, participation, resourcing and autonomy in addressing their health needs.<sup>201</sup>

We return to this policy change, and examine it in the context of the Treaty, in section 9.8.4.

### 9.6.2 Housing

In this section, we review the Crown's response to the need of Tauranga Māori for better housing, a vital precondition for improved health and well-being. Financial obstacles were one reason why unsatisfactory housing conditions persisted, but local authority practices also hindered improvements. In this section, we consider the living conditions of Māori throughout the district –in general urban subdivisions as well as on traditional Māori land.

#### (1) Assistance for Māori housing in the pre-urbanisation era

In the late nineteenth and early twentieth centuries, the standard of Māori dwellings were often criticised by officials and other Pākehā. It was well understood that poor housing conditions were associated with sickness, and when the Public Health Department was established in 1901, it began to pay attention to living standards as a factor in community health. In the first decade of the twentieth century, the Māori councils and the Government's native health officers made some effort to improve Māori housing standards, but the expense of rebuilding was often too great an obstacle for people on low incomes. Because of the complexity of their land titles, and doubts that borrowers could service loans, few Māori were able to obtain finance to replace or improve their houses. On the other hand, aspiring Pākehā homeowners could obtain private finance, or, from quite early in the twentieth century, find assistance from the State Advances Corporation.

When the Crown's Māori land development schemes began throughout New Zealand in the late 1920s, many new dwellings were built for people living on the land concerned. Some houses were constructed under the schemes set up in this district, but Nightingale's report on Māori housing in Tauranga says that the number cannot be quantified.<sup>202</sup> It is clear from a 1934 report that there were delays in executing this part of the development programme. Following a visit to families on the Kaitimako scheme, a health inspector informed the Health Department that they were living in unsatisfactory conditions. Visiting in stormy

201. Charlotte Williams, *More Power to do the Work: Maori and the Health System in the Twentieth Century*, Rangitiratanga Series 9 (Wellington: Victoria University of Wellington, 2007), p 43

202. Tony Nightingale, 'Re-Housing Tauranga Māori, 1935–72' (commissioned research report, Wellington: Waitangi Tribunal, 1996) (doc A41), p 7



weather, he found that almost everything in the tents occupied by one family was wet, and that members of another family were sheltering in a small storage shed:

Nurse Peterson and I doubt if the youngest children will live through the winter months. These families will be extremely fortunate if they do not contract serious illnesses such as Pneumonia or Pleurisy and I request that strong representations be made to the Native Land Board to provide suitable homes for them.<sup>203</sup>

Other families on this block were living in ‘one-roomed huts’, and the inspector was told that, although houses were planned, they would not be built until the block was stocked and in production.

The Crown did not begin to help Māori with housing until long after it was providing them with services in other areas, such as health and education. Apart from the land development scheme houses, until 1935 no Government financial assistance was offered to Māori wishing to improve their housing. The Native Housing Act of that year was administered by the Native Department, and was intended to address poor housing and social conditions among Māori by providing loans for new houses. It had been recognised that, because few Māori had sufficient income or capital resources to pay cash for house construction, most had to borrow. The legislation was meant to circumvent the difficulty they faced in obtaining private housing finance on the security of multiply owned land. The Act enabled the State to lend money (up to a stated limit) for the construction or improvement of dwellings, accepting mortgages of Māori land as security. The conditions under which loans could be taken out, however, were such that people on low incomes found it hard to take advantage of them. In 1938, an amendment to the Act was passed to rectify that deficiency, creating a special fund to assist the most urgent and needy cases – those lacking security for a loan or the ability to repay one. This was a departure from the usual cost-recovery approach of Government housing policy, including the Native Housing Act of 1935. It was an exception that acknowledged the fact that some urgent housing needs could not be met without Government assistance in the form of subsidisation.

The new housing schemes made a slow start, however, and were then further delayed by the Second World War. For some years, many more houses were built in connection with the land development schemes than the houses provided under the Native housing legislation.<sup>204</sup> In the whole of the Waiariki Native Land Board district (which at that time included the eastern Bay of Plenty, Rotorua, and parts of Taupō and the Urewera, as well as Tauranga), the number of houses erected, renovated, or purchased for Māori under the 1935 Act never exceeded four in any year before 1945; the total for the period between 1937 and

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203. County inspector, Tauranga, to medical officer of health, Auckland, 7 May 1934 (doc A39(a), p125)

204. Gael Ferguson, *Building the New Zealand Dream* (Palmerston North: Dunmore Press, 1994), pp 163–165

1945 was 11. The number of houses provided through the special fund in the same period was somewhat higher – 32 – but still very low.<sup>205</sup>

In 1940, a Government health official publicly acknowledged that Māori housing throughout the country had until recently been ‘a disgrace as well as being dangerous to health’. He recognised that some Māori had been helped by the housing schemes, but stated that over half the population were still inadequately housed, with a certain proportion ‘living under what are, in terms of the minimum pakeha standard, appalling conditions’. Government action had initiated a move towards better conditions, but progress was too slow.<sup>206</sup> The same year, the Health Department’s annual report stated that, although much Māori housing was ‘deplorable’, a full rehousing programme ‘would cost millions of pounds’, and was ‘economically impossible’.<sup>207</sup>

We received insufficient information to ascertain whether the Native Housing Act and its amendment had beneficial results in Tauranga. Nightingale’s view is that, until the 1950s, the legislation was largely ineffectual in improving the housing situation of Tauranga Māori.<sup>208</sup> The annual number of houses built or renovated under the Act in Waiariki did not begin to rise until after the war, and even then took a while to gain momentum: the figure for 1949 was still only 38 for ‘ordinary’ loans and 15 for ‘special’ loans.<sup>209</sup>

Even by 1950, then, only a small beginning had been made to address the housing needs of Tauranga Māori – despite the Government having known since the 1930s that much Māori housing in the region was substandard. We have already mentioned the 1936 survey that showed defective construction, inadequate facilities, and serious overcrowding were common in Māori dwellings in Tauranga County. The physical and psychological effects of living in such conditions were vividly illustrated in the evidence we heard – for example, from Morehu Rahipere, who spoke of life in Hūria in the 1930s:

My earliest memories are of living in Huria in a raupo whare with my mother and my father and two other children, my sister Hopaea and my younger brother Hamiora. There was only one room with a dirt floor and a kauta [cooking shed] outside. In those days we had big sugar and flour sacks which were cut down the seams to make a big sheet which served to partition the room. That way you would get two rooms out of one, with Mum and Dad in one and us children in the other.

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205. AJHR, 1938–45, G-10

206. HB Turbott, ‘Health and Social Welfare’, in ILG Sutherland (ed), *The Maori People Today: a General Survey* (Christchurch: Whitcombe and Tombs, 1940), pp 243–245

207. HT Armstrong, ‘Department of Health: Annual Report of the Director-General’, 1940, AJHR, 1940, H-31, p 51

208. Document A41, p 7

209. Department of Maori Affairs, ‘Buildings Erected, Renovated and Purchased’, 31 March 1949, AJHR, 1949, G-9, p 25

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As time passed, my father replaced the leaking raupo roof with corrugated iron. This helped to keep the rain out.<sup>210</sup>

Another account came from Te Hoori Rikirangi, who was born in Hūria in 1937. ‘I remember the poverty from my childhood’, he told us, and continued:

Many whanau of the marae were pohara or impoverished. The main thing was the housing, there were only a few timber houses in Judea . . . The rest of the houses were shacks made from corrugated iron, which were very cold in wintertime and they all had earth floors . . . It was very overcrowded around the confines of the marae. The very limited area to grow kai was the most destructive consequence of having no land for my people.<sup>211</sup>

Marama Furlong, of Ngāi Te Ahi, was born in 1936, the year of the survey we have referred to. She told us of how the lives of her parents and other members of her whānau were affected by poor housing, and the inadequacy of the Crown’s response, during her childhood years in Maungatapu, Ranginui, and Hairini:

A major hardship for the whanau was housing. There was no help or encouragement for housing improvements what so ever. When I was young, I recall incidents of the difficulty that was felt by my parents at times. . . . There were other members of the whanau who had similar experiences. The commonality was the difficulty to move forward. Therefore, a substandard way of existence was the norm. My younger brothers and sisters would sometimes live with uncles or aunties for a time. Because of the additional numbers of tamariki, and the cramped living standards, that was the way we were as a whanau.<sup>212</sup>

Kingi Ranui, of Ngāti Ruahine, recalled his childhood home at Waimapu in the 1930s and 1940s:

Our house at Waimapu was along a straight line from the wharenui. It was only one room, and we used it for cooking. My Aunty and Uncle slept there, and all us kids slept in the wharenui. There were also sleepouts built of corrugated iron and wooden poles.<sup>213</sup>

Later on, housing considerations and title issues affected Mr Ranui’s choice of work and his move into town:

It was good to work on the wharf because when you finished up there, you’d get a super payout. That was important because for us it was the only way we’d be able to afford a house, because it was hard to get a loan to build on Maori land. This was one of the reasons we ended up moving into town.<sup>214</sup>

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210. Document F17, p 3

211. Te Hoori Rikirangi, brief of evidence, undated (doc F22), p 2

212. Marama Hikatangata Furlong, brief of evidence, 30 June 2006 (doc R49), pp 3–4

213. Kingi Kino Ranui, brief of evidence, 22 May 2006 (doc Q6), p 2

214. Ibid, p 5

Testimony like this confirms the considerable archival evidence and statistical data about the crowded and unhealthy living conditions endured by many Māori in the Tauranga area in the middle of the century.

**(2) Assistance for Māori housing in the post-war era**

As Māori settlements became engulfed by the spreading urban area in the post-war period, many Māori households found themselves adjusting, by choice or necessity, to living in urban subdivisions. One way of achieving this end was to take out a Māori Affairs loan to build a house. Alternatively, Māori families could, from the late 1940s, apply to become tenants of State-owned rental houses. We were not, though, given any information for this period about the extent to which Māori in Tauranga were allocated rental housing of this kind or about any issues arising from the administration of this programme, and no matters relating to State houses were raised in the claims before us.

How to get better houses built on lands in multiple ownership had been a long-standing problem throughout the country, and Tauranga was no different. But, as we saw in chapter 5, where such land was in an urban or peri-urban area, retaining and using it became even more complex and problematic, especially from 1945 onward as urbanisation and development pressures intensified. Zoning changes, escalating rate burdens, and the associated pressure to individualise title, subdivide, and alienate, were of crucial significance for housing. The Department of Māori Affairs initiated some important assistance measures to address housing issues in Tauranga, particularly between the late 1950s and the mid-1960s, and from 1959 onwards it became possible for families to capitalise the Family Benefit, which helped more applicants obtain loans. However, some of the most important decisions affecting Māori housing in the region were taken by local rather than central government. In many ways, dividing the administration of housing development between central and local government was not beneficial to those in need of housing assistance.

It is clear that Government efforts at this time did have some effect – not least in that, from mid-century, the pace of house-building under the Māori Housing Act 1935 and Māori land development schemes increased. In the Waiariki district in the year to 31 March 1950, for instance, the combined total of houses completed under both policies reached 99, and rose again the following year to 111 houses.<sup>215</sup>

In some areas improvements were slower to arrive, but did come eventually. In 1956, the Māori Affairs Department's journal *Tē Ao Hou* profiled Rereatukahia, a rural settlement in the Katikati area where housing standards were very low. The journal described 'an atmosphere of gloom and misery' in the settlement, with residents 'aware of the conditions without knowing how they could be remedied. Progress was everywhere around them, but they felt left behind'. After adverse press publicity, there were moves to have the houses

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215. AJHR, 1950, G-9, p 20; AJHR, 1951, G-9, p 16

condemned, but the department decided to make a concentrated effort to improve the situation.<sup>216</sup> Once a housing survey classified the area as ‘depressed’, it became a priority area for Māori Affairs housing. Meetings were held with the residents, and 12 households were helped to apply for loans. By July 1956, five of the required houses had been constructed, and by March 1960, Rereatukahia was no longer categorised as a depressed housing area.<sup>217</sup>

The situation in districts closer to the Tauranga urban area was more complicated. In the 1950s, the public became increasingly aware of poor housing conditions in Māori communities such as Hūria, Maungatapu, and Hairini, all of which had recently been incorporated into Tauranga borough. A survey in 1955 showed that 14 of 16 houses at Hūria were in a bad condition, but no improvement had occurred by 1960.<sup>218</sup> In 1959, none of the houses in Maungatapu was in a satisfactory condition, 14 were unsatisfactory, and nine urgently needed improvements. A borough councillor was quoted in the press as declaring that housing conditions in Maungatapu were worse than in Auckland’s Freeman’s Bay, which at that time was the most notorious urban slum area in the country.<sup>219</sup> Progress in rectifying these situations was slow. In 1963, the Maori Affairs Department was still describing the position at Hūria as ‘grim’ and ‘so bad that we should get on to it right away’.<sup>220</sup> Efforts accelerated, but as late as 1965, a departmental survey showed that, although many Māori by then owned their own homes (often acquired with Government finance), approximately a quarter of Māori housing in Tauranga and Te Puke was unsatisfactory: it was unsound, crowded, or both.<sup>221</sup>

### **(3) *The impact of planning rules on peri-urban Māori land***

It was no simple matter to improve the housing stock on peri-urban Māori land. During the critical time of early urbanisation, from 1945 to 1960, the existing legislation gave Tauranga Māori little protection from the impact of urban growth and development. Nor did it adequately recognise the particular housing needs of Māori communities near the fast-spreading town. Under the terms of the Town and Country Planning Act of 1953, the borough council had the power to create a district planning scheme, but as we have explained in chapter 5, the legislation gave no guidance as to how the plan should relate to Māori development. Marae were classified as an ‘existing use’, but the Act did not require the borough council to consult with Māori to assess their needs. Nor did it recognise that the planning needs of Māori landowners might be different from those of Pākehā (in fact, legislative recognition of Māori interests in the planning process did not occur until 1977). Because of the

216. ‘Modern Homes Where They are Needed’, *Tē Ao Hou*, no 17, December 1956, pp 33–34

217. Ibid, pp 34–35; doc A38, p 157

218. Document A38, pp 162–163

219. Ibid, p 163

220. CM Bennett, internal memo, Department of Maori Affairs, 13 August 1963 (doc A38(c), p 918)

221. Document A38, p 165

planning regime, and the flow-on effects in terms of loan availability, it had become very difficult to build houses on Māori land around the various marae. Further, all through this time, as zoning changed from rural to urban residential, there were huge rating increases in peri-urban areas that often led to Māori land there being sold.

The impact on Māori of the Crown's actions during this period of rapid urbanisation is illustrated by what happened at Whareroa. In the 1950s, Māori landowners there tried but failed to subdivide and develop land for the purpose of providing better housing. As chapter 5 described, their efforts were thwarted by the rezoning of the land as industrial, and by extensive public works takings and large rating increases. There was a similarly unsatisfactory outcome when Māori land at Maungatapu was subdivided for residential housing after the peninsula was incorporated into the borough in 1959. It seems that in the first block to be subdivided, Maungatapu Z, most of the sections were acquired by non-Māori. Among later subdivisions, only 36 of the 259 sections in Maungatapu B ended up in the hands of the former owners of the subdivided land. As Desmond Kahotea commented: 'Generally, residential zoning of Maori land is viewed as compulsory alienation. Once zoned it inevitably becomes subdivided for residential use, sections sold, and the land rarely comes back to Maori ownership.'<sup>222</sup> At Matapihi, however, the owners successfully resisted alienation and subdivision for general residential development, though they found it difficult to use the land for a purpose that was very important to them – namely, the improvement of their own housing.

Nightingale suggests that the borough council strongly supported rehousing Māori who lived in the settlements newly incorporated into the borough because it wanted to encourage individual ownership and open up Māori land for general residential development. He quotes the mayor of Tauranga, DS Mitchell, who in 1960 began a drive to eliminate substandard Māori housing in the borough. Reporting to his council about this campaign, Mitchell noted that the city had issued 10 closing orders under the 1956 Health Act, but said he wanted to 'do more to raise the standard of the Maori and inquire into the position to see why more houses cannot be built'. He also stated that it would be beneficial if Māori land could be divided, so that individual owners could obtain titles and then loan finance.<sup>223</sup> Nightingale observes: 'By putting pressure on Tauranga Maori to re-house, Government and Council officials were putting huge pressure on them to sell ancestral land to finance their re-housing.'<sup>224</sup>

The Māori Affairs Department, however, was not inactive in trying to address the situation. By January 1961, it had built 29 houses in Tauranga borough, two more were under

222. Desmond Tatana Kahotea, 'Western Bay of Plenty Urban Development Study: Taha Maori / Maori Perspectives', May 1986 (doc A16, p 15)

223. 'Sub-standard Housing Worries Mayor', *Bay of Plenty Times*, 31 May 1960 (doc A41(a), p 108)

224. Document A41, p 27



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construction, and there were 23 applications pending. A number of houses had also been financed through the State Advances Corporation. Nevertheless, it was estimated that 218 houses were required for Māori in the district: 115 in Tauranga borough and 103 in Matapihi, Bethlehem, and other localities close to the borough boundary.<sup>225</sup> The department noted that Māori with land interests ‘are not interested in housing on Crown sections in Tauranga but wish to build on their own land. No doubt more applications will come forward when and as soon as subdivisions in Judea [Hūria] and Maungatapu–Hairini are completed.’<sup>226</sup> By April 1964, two houses had been completed at Hūria and three were under construction; five substandard houses had been demolished, and three were about to be demolished.<sup>227</sup>

A 1960 Māori Affairs document gives an insight into the department’s thinking at this time:

Maori lands that are available and suitable for housing should be utilised for the owners themselves, as far as possible, due regard being given to its proximity to the modern amenities that are now considered to be necessary in any progressive housing settlements. The basic idea seems to be that Maori people should first be housed on their own lands – provided that these lands are suitable for housing development – and that the necessary finance should be made available so that they are able to obtain titles that can attract State investment.<sup>228</sup>

The memorandum went on to indicate an intention ‘to find a way wherever we can to have a reasonable number of sections sold to Europeans’. Although stating that the ‘prime purpose’ of the policy was to provide ‘better housing for the people’, the paper was careful to point out that:

it does also meet the question of the proper utilisation of lands that are at present unoccupied. The matter is a problem that is being brought forward more and more by the action of County Councils in applying to the Maori Land Court for rate charging orders and receiverships.<sup>229</sup>

Nightingale’s view is that the Māori Affairs Department and the Tauranga Borough Council saw the subdividing of Māori land at Hūria as an opportunity to advance the integration policy and satisfy the town’s need for more residential areas.<sup>230</sup> Stokes demonstrates how encroaching urbanisation came to dominate the development of Hūria from the 1940s. By the 1960s, some tangata whenua still lived in the area but most, through the operation of

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225. Document A38, pp 163–164

226. District officer to Head Office, Māori Affairs Department, 20 January 1961 (doc A38(c), p 932)

227. Document A38, p 164

228. Registrar, Māori Land Court Rotorua, to Head Office, Māori Affairs Department, 1 December 1960 (doc A41(a), pp 93–94)

229. Ibid

230. Document A41, p 15

the department's Māori housing improvement programme, had been dispersed through the new suburban residential areas of Ōtūmoetai and Greerton.<sup>231</sup>

Māori housing figures for the Waiariki Māori Land Board district in the 1950s show that the programme set up by the Government in 1935 had been stepped up considerably since the slow start in the 1930s and 1940s. During the decade to 1959, the average number of houses completed in Waiariki each year was just over 100; there were also 151 renovations in this period, as well as a few purchases of houses for Māori occupancy.<sup>232</sup> That said, our inquiry district was of course only one part of the Waiariki district, and we do not have figures specific to Tauranga.

#### **(4) Housing programme challenged by population growth**

In 1960, it was acknowledged in Wellington that although the national Māori housing programme was lifting housing standards in one sense (by enabling more houses to be built), the rapid rise in the Māori population meant that it was not reducing overcrowding.<sup>233</sup> The challenge posed by population increase was also recognised in the Hunn report (1961). This important policy statement noted that, while the housing programme grew every year, it still 'falls short of the need and is losing ground in comparison with the rapid rise in Maori population. To cope with the problem, the programme would have to be doubled and later trebled'. Posing the question whether the State should accept a greater responsibility for housing Māori than for housing Pākehā, the report's author, JK Hunn, answered that 'for a decade or so yet, the answer must be Yes, because they are generally less able [because of lower incomes] to fend for themselves'.<sup>234</sup>

The 1960s saw another increase in the Māori Affairs Department's housing figures,<sup>235</sup> and in June 1965 the mayor of Tauranga, DS Mitchell, spoke of the 'remarkable progress' made in improving Māori housing within the city bounds. In close cooperation with the Māori Affairs Department, he said, the city council had seen to it that the worst of the substandard dwellings had been removed and replaced with modern houses.<sup>236</sup>

At this time, prospective Māori home owners still faced many difficulties – including negotiating land title complexities to find an eligible site, amassing the funds needed for a deposit, bridging the gap between the maximum loan and the actual cost of building, and servicing the loan once the house was built. In areas that were still rural, the county council

231. Document A15, pp 11–15

232. AJHR, 1950–59, G-9

233. 'Report of the Board of Maori Affairs Secretary, Department of Maori Affairs, and the Maori Trustee', 31 March 1960, AJHR, 1960, G-9, p 14

234. JK Hunn, 'Report on Department of Māori Affairs with Statistical Supplement', 24 August 1960, AJHR, 1961, G-10, pp 36, 38, 43

235. AJHRs, 1960–1969, G-9. We note here that, in 1962, Tauranga was transferred to the Waikato–Maniapoto Land Board, which also covered Hamilton and parts of south Auckland.

236. 'Maori Housing Standards Now Showing Great Progress', *Bay of Plenty Times*, 19 June 1965, p 6 (doc A38(c), p 897)

tended to discourage the partition and settlement of Māori land, to avoid uncontrolled rural subdivisions. Owners of rural Māori blocks were rarely allowed to partition out their interests into lots of less than 10 acres. Many, as a result, simply built homes on the edges of communal land without formal approval.<sup>237</sup> After the Māori Affairs Amendment Act was passed in 1967, it became very difficult (if not impossible) to partition multiply owned land for residential purposes in areas zoned rural. Despite this, the 1967 Rating Act made those part-owners who had already constructed a home on the land liable for rates on the whole block.

In his evidence before this Tribunal, Joe Kee, of Ngāti Ruahine, spoke of his grandfather's experience in the late 1950s or early 1960s. He had unsuccessfully applied for a Māori Affairs loan to rebuild at Poike after his house had burned down. The witness commented:

Looking back now, you can see that this was a clear example of how government policy impacted upon us. Government policy was to encourage Maori to move from their traditional rural areas into urban areas. This policy made it very difficult for Maori to get housing loans in rural areas, such as Poike.<sup>238</sup>

'As a consequence', he said, 'my grandfather couldn't rebuild or look after the farm, and he couldn't stay there on the land'. Lance Waaka, also of Ngāti Ruahine, made a similar observation, saying that 'a lot of people left [Waimapu], because they couldn't get a loan to build here on Maori land'.<sup>239</sup> Stories like this no doubt underlie much of the movement of Tauranga Māori away from their ancestral lands to the urban residential areas in these post-war decades.

#### **(5) *Integration and pepper-potting***

Another significant aspect of the Crown's Māori housing improvement schemes – less tangible than the effect of better housing on health and physical welfare, but still important to claimants – was the official policy of encouraging the 'integration' of Māori and Pākehā housing. Advocated in the Hunn report of 1961, the integration policy led the Department of Māori Affairs to encourage 'pepper-potting' – the intermingling of Māori and Pākehā households in suburban subdivisions. As the Minister of Māori Affairs told Parliament in 1962, 'in the Government's view segregation of Māoris in urban areas should be discouraged . . . Maori houses in urban areas should be erected among non-Maori houses on the basis that there was no room for segregation in New Zealand'.<sup>240</sup> New Māori homes would be scattered through largely Pākehā neighbourhoods, or – as the department envisaged in

237. Marinus La Rooij, "'That Most Difficult and Thorny Question': The Rating of Maori Land in Tauranga County' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc P14), p 77

238. Joe Kee, brief of evidence, 26 June 2006 (doc R29), p 25

239. Lance Hori Waaka, brief of evidence, 22 May 2006 (doc Q5), p 4

240. J Hanan, 7 August 1962, NZPD, 1962, vol 331, pp 1258–1259

areas such as Hairini and Maungatapu – some housing lots would be sold to non-Māori after Māori land had been subdivided, resulting in the settling of Pākehā among Māori.<sup>241</sup>

While many Tauranga Māori were rehoused after 1945, the nature of Crown housing assistance in the 1950s to 1970s left a somewhat ambivalent legacy. To obtain rehousing assistance, it was frequently necessary to obtain individual title, and this could result in further loss of tribal land. Also, the relocation of Māori households away from their ancestral land denied hapū the option of developing vibrant, well-housed communities centred on a marae. Ngaputiputi Pukekura described for us the sense of ‘alienation and isolation’ felt by her family when they moved from ancestral land at Maungatapu to a State housing suburb in the 1960s.<sup>242</sup> Obviously, too, the policy of ‘pepper-potting’ potentially affected hapū and iwi culture. The Māori Affairs document we have already quoted alludes to this:

‘Pepper-potting’ new houses in town areas for Maoris who have no sections of their own can be the beginning of integration and could be the guide for its future application. Indeed [for] integration to be successful, [it] should not be just a matter of housing placements but rather that the people who are to be available for its implementation are those who can harmonise into the European pattern and are able to discharge their obligations on the same basis as their European neighbours.<sup>243</sup>

There is little specific information in the record of inquiry about how ‘pepper-potting’ was implemented in Tauranga, or about the number of Māori affected by this policy or by the rehousing programme as a whole. It seems likely, however, that the integration policy in housing weakened, or at least diluted, Māori community cohesion, and there is evidence that some Tauranga Māori were opposed to it for that reason. Certainly, as we have already seen, Māori Affairs staff were aware in 1961 that Māori at Hūria were ‘not interested in housing on Crown sections in Tauranga’, but preferred to ‘build on their own land’.<sup>244</sup> And that same year, during a meeting about the proposed subdivision of Matapihi land, Turi Te Kani, of Ngāi Tūkairangi, stated that there was considerable opposition among Māori to aspects of the Government rehousing programme. Māori who owned land in Matapihi resented being ‘transplanted into somebody else’s backyard – like Tauranga and Mount Maunganui’, he said, and were not at all enthusiastic about having to ‘go afield to find shelter and homes’.<sup>245</sup>

The strength of the Matapihi people’s resolve to avoid incorporation into the borough indicated their desire to take control of their own future, and to avoid the rating pressures and negative socioeconomic repercussions associated with zoning changes. During the meeting mentioned above, Te Kani expressed concern that only two houses had been built

241. Registrar, Māori Land Court Rotorua, to Head Office, Māori Affairs Department, 1 December 1960 (doc A41(a), pp 93–94)

242. Ngaputiputi Taniora Pukekura, brief of evidence, 2006 (doc Q33), pp 9–10

243. Document A41(a), p 93

244. Ibid, p 93

245. ‘Matapihi Maoris Want Land Subdivided in Area’, *Bay of Plenty Times*, 12 April 1961 (doc A41(a), p 83)

in Matapihi in the last four years, although the population was about 600. The chairman of the county council, A G Spratt, argued that separate housing for Māori should be discouraged, and the subdivision did not proceed. The strength of the prevailing integrationist ethos is illustrated by Spratt's words at the meeting:

Subdivide land in Matapihi and its Maori residents could possibly go the way of the black race in South Africa – become segregated – with the blacks in Matapihi and the whites on the other side of the water. The Secretary of Maori Affairs, Mr HK [sic] Hunn, wants to integrate further the Maoris and Pakehas. If you as a race insist on living on your own, the time will come when your position will be the same as that of the black South Africans. We are all New Zealanders, and I believe that in two generations your people won't want to live separately.<sup>246</sup>

Te Kani's response was that the Matapihi people did not want segregation but nor did they want 'over-development' in the district. And, he said, 'the last thing the Maoris want to do is sell their birthright'.

#### **(6) A more flexible approach to Māori land?**

During his period as Minister of Māori Affairs (1972–75), Matiu Rata attempted to amend the 1935 Māori Housing Act, with the aim of allowing a more flexible approach to the subdivision of Māori land. The Ministers of Local Government and of Works and Development opposed this, arguing that any special exclusion of Māori from planning restrictions would be undesirable.<sup>247</sup> The position remained unchanged, except that the introduction by the Tauranga County Council of marae community zones into its district plan in the 1970s allowed a limited degree of housing development around active marae. By 1980, there were seven such zones in county localities situated within the inquiry district.<sup>248</sup> As mentioned in chapter 5, several Māori communities took advantage of this beneficial innovation to build kaumātua flats and then whānau housing, but planning restrictions still posed problems. Commenting in 1974 on the situation in rural Tauranga, the *New Zealand Herald* observed:

In the areas outside the city and borough boundaries there are blocks of Maori land suitable for house sites but, because of the operative scheme plans under town and country planning, only in exceptional cases will the county approve the partition of areas less than set out in its ordinances.<sup>249</sup>

246. 'Matapihi Maoris Want Land Subdivided in Area', *Bay of Plenty Times*, 12 April 1961 (doc A41(a), p 83)

247. Document P14, pp 78–79

248. Document A15, pp 5–6; doc A16, pp 23–24. In 1980, the seven marae community zones were at Tuapiro, Rereatukahia, Opureora, Peterehama (Bethlehem), Tamapahore, Tahuwhakatiki, and Waikari. By 1988, the county council was able to point to 17 marae community zones within its boundaries: Tony Walzl, 'Ngāti Ruahine: Land Issues Overview 1900–2000' (commissioned research report, Wellington: Waitangi Tribunal, 2001) (doc N2), p 153.

249. 'Housing Major Social Problem', *New Zealand Herald*, 10 June 1974 (doc P14, p 79)

While welcoming the concept of marae community zones, Rata still regarded the Town and Country Planning Act as a significant obstacle to the use of ancestral lands. At a Labour Party Māori policy convention at Maungatapu marae in 1975, he stated that ‘Maori had no option but to leave the Marae when they were not permitted to repair or build on their own land.’<sup>250</sup> And as Nightingale points out, the advent of Tauranga’s marae community zones was belated, since it took place after the key rehousing decisions had been taken.<sup>251</sup> Marae had certainly been recognised as places for residential development, but it was still only an ancillary use involving a small number of houses. These limitations were clearly pointed out by Tauranga Māori in 1974, when they submitted that ‘marae community zones must be large enough to permit a reasonable number of homes to surround the marae – to provide an adequate age coverage, a sufficient caring force and to ensure through numbers the contribution of the culture that those marae represent.’<sup>252</sup>

The submission emphasised that not all owners wanted to live on marae land, but argued that the option to do so should be permitted. Stokes comments that it was a common Māori preference ‘to live in a rural marae community and commute to work in an urban area or elsewhere.’<sup>253</sup> Writing in 1986, Desmond Kahotea summarised the objectives of Māori who were continuing to press for residential development of marae zones: namely, the desire of hapū members to support the marae workforce; a disillusionment with the urban environment for the maintenance of culture; the desire of kaumātua to see an adequate age representation in the area; the desire to maintain hapū ties and relations; a preference for living on ancestral land; and the perception that dwellings were a social investment in the future. ‘A house is built to maintain a continued relationship with the marae and ancestral land’, he wrote.<sup>254</sup> Marae community zones were a step forward – but, as we explain below, the problems surrounding housing development on Māori land persisted in later decades.

The 1950s and 1960s had been a high point of State assistance for rehousing Māori, in Tauranga as elsewhere. During the 1970s, Māori Affairs home lending reduced (as did the State’s involvement in the housing mortgage market as a whole). Gael Ferguson writes that by this time: ‘there was no attempt to maintain a special programme for Maori in recognition of their low ownership rates, beyond the small amount of lending undertaken by the Department of Maori Affairs.’<sup>255</sup> The assessment of EMK Douglas, however, is that even in the 1970s, when the Māori Affairs Department was still building more than 1000 houses a year across the country, the programme was ‘woefully inadequate.’<sup>256</sup>

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250. ‘Planning Act Causes Drift Into Towns’, *Bay of Plenty Times*, 1 September 1975 (doc P14, p 79)

251. Document A41, p 32

252. ET Durie, submissions on behalf of the Matapihi–Ohuki Trustees and Bethlehem and Wairoa Marae Committees (Stokes (doc A15, pp 26,27)

253. Document A15, p 29

254. Document A16, pp 23–24

255. Ferguson, p 266

256. EMK Douglas, *Fading Expectations – the Crisis in Maori Housing: A Report for the Board of Maori Affairs* (Wellington: Department of Maori Affairs, 1986), p 6



By the 1980s, only small numbers of Māori Affairs houses were being built. This reflected both the small size of the department's housing budget and, in a wider sense, the State's gradual withdrawal from its long-standing loans programme for assisting the nation's population into new housing.<sup>257</sup> Nationally, the Māori Affairs Department reviewed its housing programme and told the Government in 1982 that there was 'still a major gap to be closed in terms of upgrading Maori housing'; it asserted that a vigorous programme was still essential.<sup>258</sup> In 1984, the department reported that its resources were insufficient to meet all Māori housing needs, and that in future it would place more emphasis on helping applicants obtain loans from the Housing Corporation and other lenders; the department's own funds would be concentrated on applicants who were especially needy or unable to obtain other finance.<sup>259</sup>

#### **(7) Assistance for Māori housing in recent decades**

The Crown's programme for Māori housing assistance did not cease altogether, but from the 1970s onwards it was on a much smaller scale than in its heyday. The Māori Affairs Department's housing section had been dissolved by the mid-1980s, and while the Housing Corporation met some Māori housing needs through rental housing and housing loans, demand outstripped supply. Desmond Kahotea commented, for instance, that in 1985 there were 50 needy families on the waiting list for housing assistance in Maungatapu alone.<sup>260</sup> In 1986, EMK Douglas was moved to report that:

Maori needs are not being met because no-one is monitoring their needs, neither the Department of Maori Affairs, nor the Housing Corporation nor the National Housing Commission. This omission appears to be because Maori housing demand is only seen as part of the overall, monocultural solution.<sup>261</sup>

In short, the approach failed to appreciate the distinctive difficulties facing potential homeowners who were Māori. The longstanding problem of building on multiply owned land persisted, and the strictness of local planning requirements continued to make it difficult to improve houses on such land.<sup>262</sup> It was apparent to many Māori prospective homeowners, in Tauranga as elsewhere, that partitioning land into separate titles for mortgage purposes was unsatisfactory – not only did it often lead to alienation of the land but it was also difficult to arrange. Consequently, many Māori simply remained in substandard houses.

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257. Ferguson, p 266

258. 'Report of the Department of Māori Affairs', 31 March 1982, AJHR, 1982, E-13, p 6

259. 'Report of the Department of Māori Affairs', 31 March 1984, AJHR, 1984–85, E-13, p 13

260. Document A16, p 22

261. Douglas, *Fading Expectations*, p 7

262. Judith A Davey and Robin A Kearns, 'Special Needs versus the "Level Playing-field": Recent Developments in Housing Policy for Indigenous People in New Zealand', *Journal of Rural Studies*, vol 10, no 2, 1994, p 74

The need for better Māori housing in rural areas, too, was still great in the 1980s. At that time the Government's mainstream housing organisation, the National Housing Commission, was giving only limited attention to the rural situation.<sup>263</sup> Its first substantial acknowledgement of rural needs came in its 1988 report, which stated that just over half of all the households in 'serious housing need' nationwide were Māori, with rural people featuring prominently. The commission said that the availability and quality of housing was still a serious problem for rural Māori families, and described this situation as a 'crisis'.<sup>264</sup>

**(8) The papakāinga lending programme**

During the 1980s, as an alternative to partitioning, the Māori Affairs Department developed a new scheme for making loans for houses to be built on communally owned land, with security over the house only. Houses built under the scheme would be located on specific sites, with occupation rights conferred by the trustees of the block concerned. This 'papakāinga lending programme' was devised in 1985, and piloted soon afterwards in Tairāwhiti and Northland before spreading throughout the country. The scheme developed rapidly and still operates today under the Housing New Zealand Corporation.<sup>265</sup>

During our hearings in Tauranga Moana, claimant counsel were granted leave to question Te Puni Kōkiri and the Housing New Zealand Corporation about their role in helping Māori obtain housing, both nationally and in Tauranga. Asked whether Te Puni Kōkiri had any specific policies to assist Tauranga Māori to build homes on their land, Alison Thom (deputy secretary of the relationships and information section of Te Puni Kōkiri) answered that the organisation had no provision for funding this activity, but that loan finance could be sourced from the Housing New Zealand Corporation. She told us that under the Housing Assets Transfer Act 1993, the whole of the Crown's housing loan portfolio, including loans administered by the former Department of Māori Affairs, had been transferred to the Housing Corporation of New Zealand (as it was then called). She said that Te Puni Kōkiri did not give financial assistance to enable prospective home-owners to pay the development contributions required by local body authorities.<sup>266</sup> She did note, however, that Te Puni Kōkiri had a special housing action zones programme which, although it did not fund the actual building of houses, provided project development assistance (including financial assistance) for Māori housing development. Such assistance had been given to the Mahiwahine 2B Trust at Matapihi.<sup>267</sup>

<sup>263</sup>. Davey and Kearns, p 76

<sup>264</sup>. National Housing Commission, *Housing New Zealand: Provision and Policy at the Crossroads* (Wellington: National Housing Commission, 1988), pp 7, 77, 229

<sup>265</sup>. Douglas, pp 42, 58; M Bathgate, *The Housing Circumstances of the Maori People and the Work of the Housing Corporation in Meeting their Needs* (Wellington: Housing Corporation of New Zealand, 1987), pp 25–27; National Housing Commission, pp 61, 117, 134

<sup>266</sup>. Paper 2.628, pp 2–3

<sup>267</sup>. Ibid, p 2; see also paper 2.549, app A, pp 2–3

Ms Thom also described a collaborative project being conducted at the time of our hearings by Te Puni Kōkiri. Although it was located in Te Puke, which is not within the boundaries of the Tauranga Moana inquiry district, Ms Thom explained that it was a pilot that could be replicated to develop housing on other multiply owned Māori land in the region. She noted that any funding would be for planning the development of projects ‘and/or developing the capacity of Maori organisations or whanau/hapu groups to engage in organising them’; that is, ‘it would not cover building costs.’<sup>268</sup>

The same set of questions was put to the Housing New Zealand Corporation, the Crown agency that administers social housing and advises the Government on housing issues. In response, Greg Orchard, the corporation’s acting chief executive, outlined the organisation’s policies for facilitating the building of homes on Māori freehold land. He said the corporation had earlier transferred all its mortgages to ‘a number of institutions, one of which is the Home Mortgage Company, a subsidiary of Westpac Bank’. The principal means of providing lending assistance was through the papakāinga loans introduced in the 1980s. The loans were for houses to be built or purchased on multiply owned Māori land, and generally required a 15 per cent deposit. Mr Orchard explained that the deposit was substantially reduced – to just 3 per cent – ‘if the applicant has attended a Corporation home ownership education course, and the property is within the boundaries of the Corporation’s low deposit rural lending scheme’ (the latter being a scheme commenced in 1995). Mortgage finance of up to 85 per cent was thus available, rising to 97 per cent if the relevant criteria were fulfilled. Security could be taken over the house only, if security over the land was not practicable; standard corporation mortgages required security by way of mortgage over the relevant title as well. Where security was taken over the house only, the building had to be of such construction that it could be removed easily in case of default. No loan finance was specifically available for meeting the development charges made by local authorities, but such costs could be included in the total amount loaned. Also, community organisations might be eligible for assistance to meet charges of that kind through the loans and grants available from the housing innovation fund (established in 2002 to help community-based organisations, including Māori organisations, provide social housing for identified target groups), although funding was not necessarily available for the actual construction costs.<sup>269</sup>

Later in our inquiry, the Housing Corporation clarified that since the introduction of its low deposit rural lending scheme (a pilot scheme created in 1995 and extended to the Tauranga region in 2002), many individuals or families who would previously have applied for a papakāinga loan now endeavoured to meet the requirements of the low deposit loan scheme instead because of the lower deposit required. They were thus categorised as borrowers under that scheme. Indeed, as we go on to discuss later in this section, at the time of

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268. Paper 2.628, pp 3–4

269. Paper 2.629, apps A, B; paper 2.649, app A, p 8

our inquiry no papakāinga loans had been recorded for the Tauranga district since the start of 2004.<sup>270</sup>

The Tauranga Māori Trust Board had been engaged by the corporation to provide a free home ownership education programme, and to advise and mentor people wanting to build homes on Māori land — a service that the witness said ‘may assist people with issues concerning development of housing on Maori owned land.’<sup>271</sup> In supplementary information provided later (February 2007), we were told that 60 people had attended the five courses run by the trust board up to that time, and that 38 of these had successfully completed all the modules. Of these 38, 14 individuals or families had applied for and had been granted low deposit rural lending loans for building or buying houses in the Tauranga inquiry district; 4 of the loans were for houses on Māori freehold land (three to be purchased, one to be built), and the other 10 were for houses purchased (nine) or built (one) on general land.<sup>272</sup>

In 1987–88, 100 papakāinga housing loans were made nationwide, although we do not know how many of these were in the Tauranga Moana inquiry district, and by 1990 a total of 700 loans had been made since the inception of the scheme. By the beginning of 1992, a nationwide total of 901 loans had been approved, but a decrease was evident after that. This decline reflected policy changes, wrote Davey and Kearns in 1994, and threatened a programme that had ‘taken many years to come to fruition’ and had ‘the potential to address a long-standing and fundamental need’ – the adequate housing of Māori on multiply owned land.<sup>273</sup> The extent to which papakāinga housing loans decreased in Tauranga in the 1990s is suggested by statistics published by Te Puni Kōkiri: between 1990–91 and 1997–98, 167 loans were approved in the Bay of Plenty region (596 nationally), but the annual number had dropped from 91 (257 nationally) in 1990–91 to eight (48 nationally) in 1997–98.<sup>274</sup> Only seven papakāinga loans were made in the western part of the Bay of Plenty in the period from 2000 to 2004.<sup>275</sup> From 2001 to 2007, only one papakāinga loan was made in the Tauranga inquiry district (at Matapihi).<sup>276</sup> As stated above, since the beginning of 2004, applicants had turned to the low deposit rural lending scheme as a better option. In Tauranga since then, however, only one Māori applicant had been given a loan under that scheme for building on Māori freehold land.<sup>277</sup>

Building a house on Māori land required the aspiring homeowner to negotiate both financial and zoning hurdles. While the papakāinga lending scheme was seen as a welcome advance, it was in 1990 judged an incomplete success since it had failed to solve a number

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270. Paper 2.649, app A, p 5

271. Paper 2.629, app A, p 2

272. Paper 2.649, app A, pp 3–4

273. Davey and Kearns, pp 77–79

274. Te Puni Kōkiri, *Regional Housing Issues: Feedback from Maori* (Wellington: Te Puni Kōkiri, 1998), p 7

275. Glenn Snelgrove, brief of evidence, 29 September 2006 (doc T4), attachment 7, p 19

276. Paper 2.649, app A, p 7

277. Paper 2.649, p 5

of the legal, planning, and financial problems hampering the improvement of rural Māori housing.<sup>278</sup> This was acknowledged again a few years later in a report by Te Puni Kōkiri, which stated that even with the addition of the Housing Corporation's low deposit rural lending scheme, there still remained problems of land tenure, building costs, loan servicing, and lack of information and support.<sup>279</sup>

The Western Bay of Plenty District Council's view, as given in Te Puni Kōkiri's report, was that the main barrier to building was financial, not the difficulty of going through the council processes, since its appointment of a Māori liaison officer had effectively facilitated communication with people wishing to build on rural Māori land. Māori landowners, however – while appreciating the increased levels of consultation – believed that the council still needed to provide better information about its processes and requirements. They also mentioned the significant costs of resource consents, impact reports, surveying, and so on, and the time needed for completing the council's application process. The study found that 'frustrations with Council processes make Maori land owners lose motivation to pursue home ownership and/or erect homes without permits or resource consents'.<sup>280</sup>

An example of Māori housing development on papakāinga land in the Tauranga district is at Matapihi. Two adjacent blocks, Hungahungatoroa 1B2B2 and 1B1A, were designated for papakāinga housing by their owners in 1989.<sup>281</sup> The first stage, consisting of 19 houses, was opened in 1990. The trustees' spokesperson, Mahaki Ellis, emphasised at that time that the development was not a low-cost housing scheme: the houses were of high quality but affordable (because the land did not need to be purchased) for people who otherwise had very little chance of owning their own home.<sup>282</sup> Mr Ellis told us during our inquiry that:

the cost of developing that scheme was extremely expensive. We had to pay for the entire infrastructure including roading, water supply, electricity and storm water drainage. We also had to pay various fees to the Council imposed on us under the Resource Management Act and pay for environmental impact assessment reports.<sup>283</sup>

Riri Ellis, one of those who became homeowners in the Hungahungatoroa development, described how the commercial firm providing the loan finance (the Home Mortgage Company) was interested only in monetary matters and insensitive to the cultural dimensions of site ownership and land rights.<sup>284</sup> Her testimony included an explanation of these cultural dimensions:

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278. Davey and Kearns, p 78

279. Te Puni Kōkiri, *Regional Housing Issues*, pp 9–12

280. Ibid, pp 9–12, 15–16

281. Riri Ellis, brief of evidence, undated (doc Q10), p 3

282. *Bay of Plenty Times*, 20 June 1990, p 14

283. Mahaki Ellis, brief of evidence, undated (doc Q9), p 12

284. Document Q10, pp 4–6

Our philosophy of papakainga was always based on the notion of utilising Maori whenua in a way that supported the hapu and the backbone of our community the marae. As a result, affordability has been a driving principle of practice within our papakainga. The utilisation of our whenua in ways that are consistent with tikanga Maori is another. Another principle has been communal access. For that reason, we do not have any sense of private property within the common areas of the whenua and the block. Most people are permitted to access most areas of the block. We also keep the costs of our kaumatua flats at an absolute minimum. It only costs \$80.00 per week to rent a two bedroom flat.<sup>285</sup>

The same loan finance company was also criticised in claimant evidence relating to one of the Kaitimako blocks, where a number of houses originally built under the papakāinga loan scheme are said to have been removed by the company in response to payment defaults.<sup>286</sup> We were not given any further evidence on this matter, but claimant counsel stated that another disputed action of this kind was still unresolved (and subject to legal proceedings) at the time of our hearings, and that similar cases were occurring on other Māori land. Counsel submitted that it was inappropriate for targeted Government housing loans, made to facilitate Māori housing development on multiply owned land, to be transferred to 'a private organisation which does not have these objectives but is rather focused on short term profit.'<sup>287</sup>

**(9) Building housing on Māori land: continuing problems**

As the Matapihi example indicates, 'rural' Māori land is not confined to the Western Bay of Plenty District Council area. It should be remembered that a large proportion of Māori land within the Tauranga City Council boundaries is still zoned rural. We note that the Horaparaikeke Ahu Whenua Trust told Parliament's Commerce Committee in 2008 that of the 1951 hectares of Māori freehold land in the Tauranga City area, about 1429 hectares was zoned rural; it made up approximately 75 percent of Māori land in the city. Only two dwellings per title were permitted on rurally zoned land, and this restriction took no account of the size of the block, or the possibility that the land might be communally owned and thus needed to accommodate many owners.<sup>288</sup>

The problems of developing housing on Māori land are thus evident in both the local government areas of the inquiry district. Riri Ellis told us about the obstacles she found when working as a coordinator for Ngāi Te Rangi iwi rūnanga's rural housing project in 2005, when efforts were being made to assist trusts at Ōtāwhiwhi, Matakana, and Rangiwaia. She commented that it did not take her long to realise that Māori housing was a difficult task

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<sup>285</sup>. Ibid, p7

<sup>286</sup>. Tai Taikato, brief of evidence, 2006 (doc Q30), pp 4–5

<sup>287</sup>. Paper 2.659, pp 27–29

<sup>288</sup>. House of Representatives, 'Inquiry into Housing Affordability in New Zealand', Report of the Commerce Committee, August 2008, p 8



to progress (and even more so on the islands). Among the barriers she mentioned were the need to deal with multiple levels of bureaucracy, the difficulty of obtaining information from the relevant bodies, the need to provide the owners with more training and support, severe zoning restrictions, high compliance costs, strict borrowing limitations, the difficulty of servicing loans, and high building costs. She added that none of these was new: ‘these same issues have continued to hinder the development of Maori land and consequently [of] Maori housing for years.’<sup>289</sup>

Ms Ellis went on to expand on these difficulties:

A glaringly obvious option for affordable housing for Māori is to build a home on Māori land. The likelihood of accessing affordable housing on Māori land in ways that are consistent with tikanga Māori, whilst they seem simplistic given that in many cases the land appears under-utilised are also very limited and getting worse. To build your own house on Māori land is a difficult process.

One of the immediate problems is the local government regulations related to the number of houses that can be built on rural land. At this time, there is a limit of two houses per 10 acre block. On many occasions, that strict regulation has been enforced. In the odd exception there have been provisions for building two houses on a general title. This is more of an accident than a well designed housing policy. . . . Where housing has been established near marae, on most occasions the land has been transferred into general title. At this point, any further papakainga developments require a resource management application that requires a variation to the current district plan rules. I am not aware of any papakainga that has been successful with this resource consent at this time in Tauranga.<sup>290</sup>

According to Ms Ellis, further problems arise from the way in which Māori trusts manage the process of allowing a small number of owners access to limited housing resources. ‘Many people miss out on housing development opportunities as a result.’<sup>291</sup>

Another obstacle is the difficulty Māori trusts face in raising the necessary finance for housing projects, including the related roading, sewerage, and water supply costs, consent fees and development impact fees. Ms Ellis stated that a single family might be charged anywhere from \$20,000 to \$40,000 before they could even consider their actual housing construction costs.<sup>292</sup> In a final comment, she emphasised the hard work being undertaken by trustees to address Māori housing problems:

Equally important is the sheer misunderstanding and lack of knowledge associated with Maori trusts in general. Many mainstream organisations are not aware of the work being undertaken by Maori trusts throughout the country nor the related legislative frameworks

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289. Document Q10, pp 11–12

290. Ibid, pp 17–18

291. Ibid, p 18

292. Ibid, pp 18–19

associated with their regulations and roles and responsibilities. If the trustees associated with Maori land trusts do not have the expertise or the networks across a range of areas such as local councils, regional councils, banks, Maori Land Court and marae and whanau it is highly unlikely that Maori housing will progress much further.<sup>293</sup>

In her experience, an important factor in successful Māori housing projects was the dedicated voluntary work of:

capable, experienced, willing and stubborn trustees who have the vision, commitment and perseverance to bring about positive change for their whanau. This is in spite of any policies that may be in place to promote housing opportunities. I say this because the technical processes associated with progressing Maori housing in particular make it such a protracted and highly politicised process, meaning any normal person would simply give up because of the sheer difficulty with the process.<sup>294</sup>

Several other witnesses spoke about the obstacles faced in attempting to use ancestral land for housing. Gordon Ranui, of Ngāti Ruahine, for example, commented about the lack of services available to those who wanted to remain on their ancestral lands at Waimapu, even though they were not particularly remote in terms of location.<sup>295</sup> And James Tapiata described the difficult situation of Ngāti Hangarau as they tried to negotiate zoning restrictions for their housing plan at Bethlehem. This witness ended with the general statement that:

the rules, the legislation just do not take into account the unique situation our hapu are in, in respect of their few remaining lands. If the rules were tailored to our situation then we could possibly extract the best development of what few lands we have remaining in our ownership.

To ensure the survival of our hapu community, it is essential that all these land development, administration and ownership issues are resolved by seeking specific solutions and mechanisms that cater for the needs of tangata whenua and our ancestral connection to our whenua.<sup>296</sup>

Mahaki Ellis gave evidence about the difficulties of developing the housing at Matapihi. Mentioning 'the pressure we have been under at Matapihi for some time to provide housing for our people', he suggested that the only way around the restriction limiting residential development to two houses on each block of land would be to allow papakāinga housing on all Māori land.<sup>297</sup> Other evidence came from Te Pio Kawe, who has worked in the

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293. Ibid, p 19

294. Ibid

295. Document Q7, p 15

296. James Tapiata, brief of evidence, 25 May 2006 (doc Q46), paras 23–24

297. Document Q9, pp 11–12

Government Māori housing services and is the author of a guide to papakāinga housing in Tauranga Moana (see sec 9.5.2(10)). He described the position that many Tauranga Māori still find themselves in when they attempt to develop their land for housing:

The papakainga loans policy is restrictive in terms of who is eligible for finance, the maximum amount available to eligible customers, and the type of house you can build.

The private sector has been reluctant to provide finance on Maori freehold titles for housing purposes. There is a lack of expertise in the areas of Maori land and the finance sector, to develop appropriate lending strategies for multiply owned Maori land. The Crown needs to relax its lending policies to encourage our people out of renting and into home ownership.

The Crown can also simplify the partition process to facilitate settlement of our people in their own land.<sup>298</sup>

**(10) *The response of local authorities***

In 1999, when Māori housing advocates told the Western Bay of Plenty District Council about such difficulties, the council recognised the need to provide more information about the complex processes involved. Subsequently, two papakāinga housing manuals were produced and published by the Tauranga Moana Māori Trust Board, one relating to the Western Bay of Plenty District Council area, and the other to the Tauranga District Council area. These publications led prospective homeowners through the lengthy task of working with other owners of the land, any trustees, the Māori Land Court, the district and regional councils (for resource and building consents, and development impact fees), finance suppliers, solicitors, builders, and subcontractors.<sup>299</sup>

Both territorial districts in our inquiry district have papakāinga zones or marae community zones, and serious attempts are clearly being made to reduce the problems associated with building on such blocks. Most of the information we were given concerned land of this kind in the western Bay of Plenty district, although we were told about the Tauranga City Council's discussions with Māori representatives about proposed changes in its district plan.<sup>300</sup> As mentioned in chapter 6, we understand that, since our inquiry, there have been significant developments with marae zones and, at present, the city boundaries include 11 of them – six categorised as rural, five as urban, and one as papakāinga (see map 6.5).<sup>301</sup> The Western Bay of Plenty district plan, at the time of our hearings, recognised nine papakāinga

298. Ronald Te Pio Kawe, brief of evidence, undated (doc G23), p 11

299. See, for example, *The Tauranga Moana Maori Trust Board Papakainga Housing Manual for the Western Bay of Plenty Council Region*, nd [2002?], p 5

300. Andrew John Ralph, brief of evidence, 28 September 2006 (doc T7), pp 4–6

301. Tauranga City's marae zones are: Tamapahore, Hungahungatoroa, Waikari, Tahuwhakatiki, Waimapu, and Bethlehem (rural); Whareroa, Hairini, Maungatapu, and Hūria (urban); and Ngāti Kāhu (papakāinga).

zones, though only four of them (Tuapiro, Tawhitinui, Tutereinga, and Whetū) were within our inquiry district.<sup>302</sup> The district plan notes that ‘much rural land is in multiple Maori ownership and it is consistent with the Treaty of Waitangi and the Act to recognise the need for housing on such land’. It acknowledges as a significant issue ‘the potential for controls on the use and development of rural land to conflict with the special relationship of Maori with their ancestral land and the associated desire to live on such land’.<sup>303</sup>

The chief executive officer of the Western Bay of Plenty District Council, Glenn Snelgrove, told us that housing development on multiply owned Māori land in his council’s area had been reviewed in 2004, with the aim of better understanding the current barriers to such development, identifying local solutions to address them, and possibly establishing new processes.<sup>304</sup> This followed many requests by Māori that their long-standing housing difficulties be addressed by the agencies involved. The review was jointly conducted by several organisations (including the Western Bay of Plenty District Council, the Tauranga City Council, the Māori Land Court and the Housing New Zealand Corporation). The substantial review report was released in April 2005 and made available to us as evidence.<sup>305</sup> It noted the likelihood of significant future Māori population growth in the Western Bay of Plenty, and the intention to respond through strategies such as facilitating intensified housing development on multiply owned Māori land.<sup>306</sup> The financial, legal, and administrative obstacles to Māori housing development were all recognised in the review report, which contained a number of specific recommendations to the district councils. Mr Snelgrove told us that, in his council’s view, ‘papakāinga can provide sustainable residential development on multiple-owned Maori land for whanau and hapu communities throughout the sub-region. The Council is committed to continuing its work in this area to enable Maori to provide housing on their ancestral lands’.<sup>307</sup>

Making the system better is clearly a process that takes time. We note that since the end of our hearings, a papakāinga focus group has been working with the district council and city council to improve their provision for individual houses on multiply owned land.<sup>308</sup> A further initiative has been the development of a Māori housing toolkit, *Te Keteparahamo nga Papakāinga*, to help the planning of multiple housing projects (involving groups of houses on papakāinga land, for which project leaders need information different from

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302. Document T4, p 3 and attachment 5 maps

303. *Western Bay of Plenty District Plan*, 29 August 2005, paras 2 and 2.1.7 (doc T4, attachment 5)

304. Document T4, p 4

305. Western Bay of Plenty District Council Māori Forum, *Development of Housing on Multiple-Owned Maori Land in the Western Bay of Plenty*, 2005 (doc T4, attachment 7)

306. Document T4, attachment 7, p 5

307. Document T4, p 5

308. Papakāinga Focus Group to Tauranga City Councillors, ‘Memorandum’, 28 November 2008, [http://www.tauranga.govt.nz/news/council-meetings-detail/tabid/855/aid/945/tctl/1802\\_ViewAnnouncement/Default.aspx](http://www.tauranga.govt.nz/news/council-meetings-detail/tabid/855/aid/945/tctl/1802_ViewAnnouncement/Default.aspx) (accessed 8 July 2010)

that required by individual home builders). Designed to help Māori land trusts through what were acknowledged as complex and time-consuming procedures, the guide breaks the process down into five clearly identified stages, each explained in detail. It was issued in 2009, having been prepared jointly by the Western Bay of Plenty District Council, the Tauranga City Council, Environment Bay of Plenty, and various Māori organisations.<sup>309</sup>

Along with the problems posed by land tenure problems, zoning restrictions, compliance costs, and a disadvantageous rating regime, the difficulty of servicing a loan continues to militate against a good standard of housing for Māori in Tauranga Moana. We did not obtain information about Māori who built houses on general land, although we are aware that Housing New Zealand Corporation loans are available to people on low or modest incomes. Whether building on multiply owned land or on general land, however, households find it difficult to service mortgage debt (even though in the case of multiply owned land the amounts borrowed are limited by the fact that, for Housing New Zealand Corporation loans, the security is held over the dwelling only). In 1986, it was noted that high prices for sections were pushing new housing out of the reach of those on lower incomes.<sup>310</sup> Today there is still a general lack of affordability in this region, where land values are high and the ratio of house prices to income in 2001 was among the highest in the country.<sup>311</sup> In Tauranga, this puts home ownership beyond the reach of many people in the lower income brackets, in which (as we saw at the beginning of this chapter) Māori are disproportionately represented.

#### (11) *Conclusions*

To sum up, we observe that twenty-first century Tauranga Māori are still disadvantaged in housing compared with non-Māori in the inquiry district. Leaving aside the distinction between Māori households living on Māori-owned land and those in houses built on general land, the statistics presented in Boulton's report indicate important housing disparities between Māori and other sections of the population. This situation goes back a long way, but the Crown made a slow start in addressing it. In Tauranga, additional problems arose from rapid urbanisation, in which rating and zoning issues severely affected Māori lands situated near the growing city. Despite undoubted efforts by the Crown, and latterly by local authorities too, many barriers to better Māori housing in this district still exist today.

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309. 'Te Keteparaha mo nga Papakainga', [http://www.westernbay.govt.nz/Documents/Services/Papakainga\\_Toolkit/Papakainga\\_Brochure.pdf](http://www.westernbay.govt.nz/Documents/Services/Papakainga_Toolkit/Papakainga_Brochure.pdf) (19 June 2009)

310. Document A16, pp 21–22

311. Document T4, attachment 7, pp 14–15

**9.6.3 Education**

In this section, we consider what the evidence shows about the Crown's provision of education to Māori in Tauranga: whether the level of provision was adequate in the context of the times, and whether the services provided were appropriate to Māori needs. We also examine some of the economic and cultural repercussions of the Crown's education policies and legislation.

**(1) Native schools**

In the latter part of the nineteenth century, a number of Māori communities in the Tauranga district, as elsewhere, approached the Government about the education of their children. This led to the establishment of native schools – small institutions built on land made available by Māori, and staffed by teachers appointed and paid by the Crown under the Native Schools Act 1867. The district's first such school opened at Whareroa in 1871, but it was closed after a few years because of low attendance.<sup>312</sup> In ensuing years, however, native schools opened at several other places: Maungatapu, Paeroa (Bethlehem), Hūria, Karikari (later called Pāpāmoa, and renamed Otepou in 1969), and Te Kotukutuku (Matakana Island). Of these, the Bethlehem and Hūria schools, at least, were built on reserve land,<sup>313</sup> but the one at Hūria closed permanently in the early 1890s.<sup>314</sup>

In the twentieth century, the Matapihi Native School opened in 1913, and a junior 'side school' operated on Rangiwaea Island for about 20 years. The school at Maungatapu was closed from 1895 to 1913.<sup>315</sup> But the other four native schools served their communities right through until all remaining Māori schools (the term replaced 'native schools' from 1947) were absorbed into the general school system in 1969.

We have already referred to the frequent disruption to native schools caused by sickness and population mobility in the late nineteenth and early twentieth century – especially the temporary migrations of whānau in search of work (on the gumfields, for example). We have also mentioned the contribution of native school teachers to the health care of the pupils and their families. For a picture of the schools' educational work, we draw on the short history of Pāpāmoa Native School (based on archival sources) that was included in the socioeconomic report presented to us on behalf of Ngā Pōtiki. From this, we know that the school was established in 1894 and housed in inadequate, unhealthy, and crowded buildings from then on, notwithstanding its large roll by the middle of the twentieth century.<sup>316</sup>

312. Document A38, p 52; Rachael Willan, 'From County to Town: a Study of Public Works and Urban Encroachment in Matapihi, Whareroa and Mount Maunganui' (commissioned research report, Wellington: Waitangi Tribunal, 1999) (doc F29), pp 50–52

313. Evelyn Stokes, *The Allocation of Reserves for Māori in the Tauranga Confiscated Lands* (Hamilton: University of Waikato, 1997) (doc A57), pp 167–168

314. Document A57, p 177; Waitangi Tribunal, *Te Rauapatu o Tauranga Moana*, p 269

315. Document A39, p 88

316. Document M1, pp 70–83



9.6.3(1)

TAURANGA MOANA, 1886–2006



Figure 9.6: Te Kotukutuku Māori School, Matakana Island, 1952

Photographer unknown. Reproduced from *Te Ao Hou*, No 1 (Winter 1952).

But, despite some additional information from Nightingale and Rose, we have insufficient evidence to assess the quality of the educational service provided by Pāpāmoa or the other native schools in the district. The best we can do is refer to historical studies of the national native schools service and also a certain amount of testimony from claimants.

Like the Education Board schools established in country areas where Pākehā settlers predominated, the native schools served rural communities and were not large or well equipped. Especially in the early decades, the teachers were generally less well-qualified than those in board schools: even in 1931, only two-thirds of native school teachers were certificated, although the position improved greatly after that.<sup>317</sup> While some pupils went on from native schools to the church-run Māori boarding schools for their secondary education, most did not. It is clear that the native school curriculum provided Māori children with only an elementary education that did not, in the great majority of cases, fit them for employment in higher earning jobs. The emphasis was always on basic literacy in English and basic numeracy skills (as well as health). Particularly after 1900, manual, technical, and domestic instruction was an important part of the curriculum.<sup>318</sup> Not until the 1940s and 1950s did the Education Department's Māori education policy begin to move away from the long-held expectation that most Māori children would find employment on the land, in manual occupations, or as homemakers.<sup>319</sup>

317. Judith Simon and Linda Tuhiwai Smith, eds, *A Civilising Mission? Perceptions and Representations of the New Zealand Native Schools System* (Auckland: Auckland University Press, 2001), p 337; John Barrington, *Separate but Equal? Maori Schools and the Crown, 1867–1969* (Wellington: Victoria University Press, 2008), pp 56–57, 101, 296

318. Barrington, pp 66, 107, 196–200, 223

319. Barrington, pp 232–236, 273–274, 297–298

For most of its history, the native schools system sidelined Māori culture and language. Although individual teachers were often well disposed towards the Māori communities they served, and interested in their culture, the underlying objective of assimilation to Pākehā norms was seldom questioned by officials until the early 1930s. Sir Apirana Ngata's review of this history in 1943 captures it well:

When the Maori homes and villages were the nurseries of the Maori language, history and traditions, custom and culture, it was assumed that Maori children entering the schools were sufficiently equipped in those respects, and their school career was a one way effort to assimilate the language and culture of the Pakeha, to better equip them for a future where Maori and Pakeha lived and worked side by side. Maori was largely tabooed in the schools, and Maori culture had no place in the curriculum. There was no demand for teachers to interest themselves in things Maori, except to displace them and to impose Pakeha ways and ideas . . . The lingering asset of [Maori] knowledge . . . was neglected or dismissed as out of date or not in keeping with the new order.<sup>320</sup>

From the 1930s, however, selected elements of Māori culture (especially songs, dances, and crafts) were included in the curriculum, although the use of the Māori language continued to be discouraged for some time yet.<sup>321</sup> The historian John Barrington traces the gradual and never fully completed move away from the policy of assimilation: by the time the Māori schools were discontinued in 1969, he says, this guiding principle had been 'only partially modified through a subsequent focus on adaptation, integration and finally a limited form of biculturalism.'<sup>322</sup> The 'uneven implementation' of the new policies that replaced assimilation is also discussed by Judith Simon and Linda Tuhiwai Smith.<sup>323</sup> The limited extent of the change, at least in one Tauranga school in the 1950s, was evident from the testimony of John Toma, who went to the Māori school on Matakana Island at that time:

Throughout my schooling there was no acknowledgement of our Maoritanga or any provision in our education for the reo or culture to be taken into account. The whole schooling system felt alien to me and this was partly the cause of my early exit.<sup>324</sup>

## **(2) Education Board schools**

The role of native schools in Māori education should be placed in proper perspective. It must be remembered that, throughout New Zealand, many Māori pupils attended Education Board schools rather than native schools. As early as 1909, the number of Māori enrolled in

320. Quoted in Barrington, p 257

321. Barrington, pp 114–117, 173–175, 183–191, 257–260

322. Barrington, p 303

323. Simon and Smith, ch 6

324. John Kira Toma, brief of evidence, 19 June 2006 (doc R13), p 5

board schools exceeded the number enrolled in native schools.<sup>325</sup> The dominance of board schools in Māori education increased as the years passed, so that by 1967, a century after the native schools system began, there were 52,000 Māori in board schools and fewer than 7600 in Māori schools.<sup>326</sup>

The same situation would likely have existed in Tauranga too, although we have no enrolment figures to indicate how many Māori children attended board and Māori schools respectively. We do, however, note reference to some Māori pupils attending the ‘excellent’ board school in Tauranga in 1877, and also to the setting up of a boarding establishment there to ‘enable the sons of some of the Bay of Plenty chiefs to attend’.<sup>327</sup> By 1886, there were board schools in the Tauranga, Greerton, and Katikati areas. Schools were opened at Ōtūmoetai in 1895, Te Puna in 1896, and in other places as the years passed.<sup>328</sup> Ōtūmoetai School was built on land that had formerly been native reserve, and it is likely that reserve land was used for other board schools, too.<sup>329</sup> A photograph, taken around 1900, of the pupils of Te Puna School shows that many of the children were Māori (see fig 9.7).

It is not possible for us to thoroughly compare the education received by Tauranga Māori children in the two types of school, although evidence was given by several witnesses. One was Hinerangi Purewa, of Ngāti Kāhu, who spoke of the social stigma she felt at Mount Maunganui Primary School where there were only a few Māori children in the 1940s. She and her siblings were often subjected to disparaging comments by the other children, but when she transferred to Pāpāmoa Native School she appreciated the Māori cultural elements in the school programme, and ‘we were not made to feel worthless’, she said.<sup>330</sup> The research report written for Ngā Pōtiki commented on the lack of special support for Māori children attending board schools:

These children were largely left to ‘sink or swim’. There were no programmes in public schools for teaching Maori children English. Teachers often had low expectations of Maori children and discriminated against them.<sup>331</sup>

An observation in the annual report of the Education Department in 1917 bears this out: it was noted that ineffective methods of teaching English in the lower classes meant that some Māori pupils in board schools were disadvantaged in all parts of the curriculum as they progressed through the school. This was why, stated the report, only a small

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325. Judith Simon, ed, *Nga Kura Maori: The Native Schools System, 1867–1969* (Auckland: Auckland University Press, 1998), p 18

326. Barrington, p 303

327. R O’Sullivan to under-secretary, Native Department, 9 July 1877, AJHR, 1877, G-4, p 5; H Brabant to Secretary for Native Schools, 20 July 1878, AJHR, 1878, G-7, p 2; see also doc A57, p 169, 176

328. Paper 2.556, p 2.

329. Document A57, pp 179, 180

330. Hinerangi Purewa (nee McLeod), brief of evidence, 22 June 2006 (doc R14), p 3

331. Document M1, p 69



Figure 9.7: Te Puna School, circa 1900. Both Pākehā and Māori children attended this Education Board school

Reproduced courtesy of Tauranga City Libraries (06-175).

proportion of the Māori pupils in these schools reached the upper standards or succeeded there, compared to the number who achieved well in native schools.<sup>332</sup>

### (3) Post-primary education and preparation for employment

Until well into the twentieth century, only a minority of primary school pupils in New Zealand obtained a secondary school education, largely because of geographical and financial barriers. In the town of Tauranga, secondary schooling was available from 1907 in a section attached to the primary school, before a separate secondary school was opened at 'Hillsdene' around 1945.<sup>333</sup> A secondary section was also added to Katikati School in 1931.<sup>334</sup> The proportion of secondary-schooled children was lower among Māori than among non-Māori, and even in the late 1930s, when increasing numbers of Māori children were reaching standard 6 in primary school, not many more than 40 per cent of them were proceeding to secondary school (compared to more than 60 per cent of Pākehā).<sup>335</sup> The Māori boarding schools still accounted for many of the Māori secondary school pupils (including, no doubt,

332. Minister of Education, 'Education of Maori Children', 1917, AJHR, E-3, p 5

333. 'Hillsdene' was co-educational, but became Tauranga Boys' College in 1958. Ten acres that had originally been native reserve became the college playing fields: doc A57, pp 160, 169, 172; Waitangi Tribunal, *Te Raupatu o Tauranga Moana*, p 269)

334. Kathryn Rose, response to Crown written questions, 28 September 2006, paper 2.556, pp 2-3

335. Barrington, p 150



Figure 9.8: Children catching the horse-drawn school bus to Matakana Māori school, 1951

Photograph by E Woollett. Reproduced courtesy of Archives New Zealand: National Publicity Studios Collection, Alexander Turnbull Library (F-19928-½).

some from Tauranga), and a somewhat smaller number of Māori attended State post-primary schools or district high schools such as those in the Tauranga district. Altogether, the number of Māori secondary pupils was no more than 1000 at this time. A push to provide secondary school facilities in remote Māori areas then resulted in the establishment of several native district high schools, marked at first by a strongly non-academic and vocational emphasis.<sup>336</sup> In 1954, the Māori school on Matakana Island became a Māori district high school; its secondary roll in 1960 was 31.<sup>337</sup> The secondary section closed in 1975.<sup>338</sup> Many more Māori attended secondary schools after the war than before. In the urbanisation era, most Māori children in Tauranga received their post-primary education at State secondary schools in the towns, but we were given no information on this.

The education they received did not take large numbers of Tauranga Māori into higher-paid employment. Targeted training for skilled work was an obvious ways to get more Māori into better paid jobs and, in the 1950s, the Department of Māori Affairs did indeed establish a national trade training programme for young Māori. We did not receive any

336. Barrington, pp 223–228, 299–300

337. Barrington, pp 246, 251

338. Document A15, p 22



information about this programme as it operated in Tauranga, however. The study of Hūria by Dr Maharaia Winiata (who was from Hūria himself and an impressive example of high educational attainment) stated that most men from the settlement in the early 1950s worked as labourers, especially on road work for the borough council.<sup>339</sup> Claimant evidence bore this out, as in the case of Morehu Rahipere's testimony:

Work was always hard to find, and the jobs available to us tended to be casual labouring jobs. This was the case for all the people here at Huria. The men relied on casual farm work or contract work where ever. For the women, the main work was cleaning, cooking and working as domestics in private homes or hotels. The market gardens and orchards also provided seasonal work . . . Casual work is better than nothing, but you can't really improve your circumstances without a permanent job.

After the Second World War, the living conditions here gradually improved. Jobs became a little easier to come by. I got my first permanent job with the Ministry of Works in 1946.

Once I got a permanent job, things changed for my family. I was able to bring my family up in quite different circumstances from those in which I had been brought up. The feeling that we had had when we were younger, that we were really up against it, began to lessen.

I finished with the Ministry of Works in 1957, then went on to work for the Tauranga Port Authority as a watersider for 27 years.

From the 1960s, a lot of our people were able to get work on the wharves here at Tauranga. That was a good period in which to bring up a family, with people able to get permanent jobs.<sup>340</sup>

This witness told us, however, that 'those jobs don't seem to be around any more'. While labouring work brought opportunities in the 1950s and 1960s, they were not founded on educational achievement and were not altogether secure.

Nor is there evidence that the education provided for Māori children enabled any great number of them to progress to tertiary level. While we do not have figures specifically for the Tauranga area, we have no reason to think that, the situation there differed from what was happening nationally. Census information shows that in 1966, only 0.25 per cent of Māori in the national labour force held a university qualification, although we note that this figure does not include those with teaching certificates – and we do not know how many may have dropped out of university courses part-way through, or have gained a university qualification but not succeeded in finding a job.<sup>341</sup> By 1976, the proportion of Māori

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339. Maharaia Winiata and Merran Fraenkel, *The Changing Role of the Leader in Maori Society: A Study in Social Change and Race Relations* (Auckland: Blackwood and Janet Paul, 1967), p 107

340. Document F17, p 13

341. Department of Statistics, *New Zealand Census of Population and Dwellings 1966, volume 8: Maori Population and Dwellings* (Wellington: A R Shearer, Government Printer, 1969), p 14



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attending university stood at 1.5 per cent, and still lagged far behind the figure of 8.7 per cent for Pākehā.<sup>342</sup>

A quarter of a century later, the evidence provided by Boulton's report indicates that there is still much scope to improve Māori educational outcomes in the district. For instance, there is still a significant disparity between the highest educational qualifications held by Māori and those held by the general population of Tauranga. Progress into tertiary education – while certainly improving – is still not usual. As Amy McLaughlin, of Ngāti Ruahine, told the Tribunal:

Another reason for generational failure in the tertiary system is because no one in the family has ever had tertiary education. The children have no knowledge of the tertiary system or its institutions. Simply, it is not part of their world. Psychologically, they don't have the necessary self-esteem or confidence to overcome these obstacles in order to make the Jump.<sup>343</sup>

Further, it is clear that many years during which primary and secondary schooling have been accessible have still not equipped young Māori to move in large numbers into higher-earning jobs. The employment options of successive generations of Māori in Tauranga Moana still seem to be restricted.

**(4) *Te reo Māori in the education system***

On the positive side of the balance sheet, there have been several notable developments in Māori education in recent decades – the emergence of kōhanga reo and kura kaupapa Māori among them.

By 2001, high proportions of New Zealand children received early childhood education before starting primary school, although national statistics showed that the Māori participation rate (81.5 per cent) was 11.9 percentage points behind that of Pākehā children.<sup>344</sup> Boulton was not able to locate figures for preschool attendance in Tauranga, but considered it likely that the national ethnic patterns were also evident at the regional level.<sup>345</sup> Significantly, nearly a third of Māori children in New Zealand receiving early childhood education in 2001 attended a kōhanga reo ('language nest', or Māori-medium preschool).<sup>346</sup> The first kōhanga reo in Tauranga Moana was established at Hairini in 1982.<sup>347</sup> Education in Māori at primary school level became possible too: the former Pāpāmoa Māori School was

342. Department of Statistics, *New Zealand Census of Population and Dwellings 1976, volume 8: Maori Population and Dwellings* (Wellington: Department of Statistics, 1981), p 18

343. Document s22, p 12

344. Document s5, p 127

345. Ibid, p 128

346. Ibid, p 126

347. Tiraroa Debra Reweti, 'Ngai Te Ahi Social Impact Report' (commissioned research report, Wellington: Waitangi Tribunal, 2000) (doc G2), p 7

able to benefit from the Education Act 1989, and transform itself in 1993 into a kura kaupapa Māori (Māori-medium primary school).<sup>348</sup> Units offering 'total immersion' in te reo have been established at several primary schools in the district.

This Tribunal does not intend to make findings on the issue of the Crown's treatment of te reo Māori in schools, a topic that was dealt with in the *Report on the Te Reo Maori Claim* (1986). In that inquiry the Tribunal found that in many spheres, not just in education, the Crown had breached its Treaty obligation to recognise, actively protect, and sustain the Māori language.<sup>349</sup> The Tribunal briefly considered the question of whether there had been an official policy before the middle of the twentieth century forbidding children from speaking Māori in schools and punishing them for doing so. It made only a general comment on the matter, however, stating that such prohibitions and punishments were 'clearly at least a practice widely followed'.<sup>350</sup> While we cannot make a full study of this issue, we comment on it here since it was often raised by the claimants.

Studies by historians show that the policy of discouraging Māori language use in native schools, largely to facilitate the learning of English, had its roots in the nineteenth century and was strengthened in the early years of the twentieth century.<sup>351</sup> Māori-speaking families were still numerous before mid-century. 'At the Native School everybody spoke Maori', recalled a pupil of Pāpāmoa Native School in the late 1930s; 'there were no English speakers around . . . at that time, so the actual playground conversation was done in Maori. It was only when you went into class that you spoke Pakeha'.<sup>352</sup> It is not clear that the Education Department ever formally instructed native school teachers to punish children for speaking Māori on school premises, but many former pupils have said that such punishment occurred. According to Barrington's recent study, the question of how widely punishment of this kind was administered is still 'a vexed one'.<sup>353</sup> Conflicting testimony is quoted in the history edited by Simon and Smith, who regard this as perhaps the most debated aspect of what happened in native schools with regard to language. While saying that practices varied from school to school, they conclude that a policy of banning the use of Māori in native schools undeniably existed, although it was not always followed by teachers.<sup>354</sup> The authors add that it is beyond doubt 'that a lot of punishment was meted out to pupils who defied this ban'.<sup>355</sup> The beginnings of gradual change in official attitudes to language use are evident

348. Document M1, p 83; *Te Kura Kaupapa Maori o Otepou, 1894-1994* (Otepou: Te Kura Kaupapa Māori o Otepou, 1994), pp xi, 40

349. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Te Reo Maori Claim*, 3rd ed (Wellington: GP Publications, 1996), pp 1-2

350. Ibid, p 16

351. Barrington, pp 63-64, 108-112

352. Simon, *Nga Kura Maori*, p 84

353. Barrington, p 193; see also David Williams, *Crown Policy Affecting Māori Knowledge Systems and Cultural Practices* (commissioned research report, Wellington: Waitangi Tribunal, 2001), pp 150-161

354. Simon and Smith, pp 141-157, 301

355. Ibid, pp 170-171

from the 1930s, but adherence to the old policies and practices was still widespread, and continued into the 1940s.<sup>356</sup> At Matapihi in 1933, for example, the new teacher noted in the school logbook that the children were ‘in the habit of speaking Maori in the playground’. He added: ‘We are trying to change this, and have made a rule that English must be spoken.’<sup>357</sup> The policy of discouraging Māori in schools became increasingly ambiguous after the war, but it took many years for it to be abandoned completely. Opposition to te reo having a place in primary schools was still to be found amongst officials even in the 1960s.<sup>358</sup>

There is no doubt that Māori language use declined severely in many parts of the country during the twentieth century. A survey of Māori households and communities, carried out in several parts of Tauranga Moana in 1976–77, showed that the survival of te reo in the district was far from assured. Among people aged 45 or over, all the respondents on Matakana Island were fluent speakers, while the proportion at Matapihi was 95 per cent, and at Katikati 90 per cent. At Te Puna, however, the figure was 79 per cent, and in Tauranga City, 74 per cent. The proportion of fluent speakers among respondents of all ages in these places ranged from 30 per cent to 17 per cent, with people under 24 registering very low rates in all localities. Only a few people over 45 possessed a ‘limited understanding’ of the language, but between 20 per cent and 49 per cent of the total number of respondents in all localities were in this category.<sup>359</sup> The survey gave Te Puna as a typical example:

Nearly a third of the people surveyed spoke Maori fluently, and most of them were over the age of 45. No children under 14 spoke or understood the language well, although most of them knew a few basic words and phrases . . . Nearly two-thirds of the adults over 25 spoke Maori fluently, and much of the talk between people in this age group was in that language . . . Many of the people we spoke with were worried about the drop in the number of people who knew or used the Maori language in Te Puna . . . particularly among the younger generations.<sup>360</sup>

Similar comments were made about other localities, and it was noted that in all the communities, there was much interest in having the children taught Māori in order to save the language. In Tauranga City and its vicinity, some respondents offered their opinions in more detail:

About one third of the people spoken to said they had experienced some form of punishment at school for speaking Maori. This had stopped some of them from using Maori but

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356. Barrington, pp 191–196

357. Ibid, p 193

358. Ibid, pp 260–273

359. Lee Smith and Paula Martin, *Survey of Language Use in Maori Households and Communities: Panui Whakamohio / Information Bulletin*, nos 32 (Te Puna), 64 (Matakana Island), 104 (Tauranga City, Mount Maunganui and district), 105 (Katikati, Rereatukahia, and Lower Kaimai), (Wellington: New Zealand Council for Educational Research, 1976–1977)

360. Smith and Martin, *Survey of Language Use*, no 32 (Te Puna), pp 1–3



Figure 9.9: Bethlehem Native School, 1928

Photographer unknown. Reproduced courtesy of Tauranga City Libraries (02-052).

it did not seem to have made many of them decide not to encourage their own children to speak Maori. On the contrary, the majority of people wanted their children to learn and many also wanted to learn or relearn the language themselves. A few people told us they had been strapped at school for speaking Maori . . . However, not everyone held these opinions. Some were indifferent to the teaching of the Maori language.<sup>361</sup>

The decline in Māori language use has often been linked to what happened in the nation's native schools. In the course of our inquiry, we heard a considerable amount of claimant evidence about the nature and impact of the schools' policies and practices concerning language use. A recurring theme was the sense that culture and identity were being lost through the suppression of te reo. A number of witnesses described having been punished in school for speaking Māori. Gordon Ranui, of Ngāti Ruahine, for example, recalled his days at Bethlehem Native School in the 1940s:

Even though it was called a Native School, you couldn't speak Maori. You spoke Maori, you got six of the best, but when you came home, if you talked Pakeha, you got six of the best on the legs too. My parents spoke Maori beautifully, and taught it to us. We were the last generation who spoke Maori naturally.<sup>362</sup>

361. Smith and Martin, *Survey of Language Use*, no 104 (Tauranga City, Mount Maunganui and District), p 9

362. Document Q7, p 2

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John Toma, of Ngāi Tamawhariua, told us that his parents spoke te reo to each other but would not do so in the presence of their children. When asked about this, his mother explained that ‘she did not want her children to be strapped like she was’:

It hurts me so much that I was denied the opportunity to learn and speak the reo. The loss of this was not only one of knowledge, but as I realised later in life, also one of culture and identity. I have carried that loss for many, many years.<sup>363</sup>

Reweti Te Mete, of Ngāti Pūkenga, similarly recalled that his grandparents, who were born in the first decade of the twentieth century and were fluent in te reo, chose to use English as their main language – particularly in front of their children:

Why did they do this? I will tell you why! I think it was because the government had an agenda at that time to strongly communicate to them during their formal school education an ideology that ‘the Maori Language had no purpose at all’. The Crown’s agenda was then enforced by the teachers through the education system in their own respective schools.<sup>364</sup>

Another witness who spoke regretfully about the loss of te reo was Wiremu Haora, of Ngāti Pūkenga. He recalled a teacher at Pāpāmoa Native School shouting at him when he was a pupil: ‘Don’t you bloody speak Maori here’. Although he himself was able to learn te reo at home, this was not true of many of his contemporaries, a situation that he felt led to loss of tikanga. ‘I think the Government has a lot to answer for’, he said.<sup>365</sup> In 1993, the same school, now known as Te Kura Kaupapa Māori o Otepou, became the first primary school in the western Bay of Plenty to teach all classes by ‘total immersion’ in te reo Māori.<sup>366</sup> Mr Haora expressed satisfaction that change had occurred: ‘I am really pleased that after all the years of the schooling system giving our reo such a hard time, my mokopuna are now learning te reo at school.’<sup>367</sup>

Several other claimants also spoke about recent positive initiatives by the State and by tangata whenua to revive and foster pride in te reo and tikanga locally. Te Rehina Walker, of Ngāti Pūkenga, introduced her evidence by saying that most young Māori growing up in the 1960s and 1970s had been disadvantaged by the lack of Māori language in the education system:

Without the schools teaching te reo they lost it. I think this applies to the vast majority of Ngati Pukenga and all other Tauranga iwi. They were brought up mostly in a Pakeha world. Our Maori tikanga was being lost as a result of people not being taught te reo.<sup>368</sup>

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363. Document R13, p 5

364. Reweti Te Mete, brief of evidence, 30 June 2006 (doc R46(a)), p 3

365. Wiremu Haora, brief of evidence, 22 May 2006 (doc Q28), p 3

366. *Te Kura Kaupapa Maori o Otepou*, p 42

367. Document Q28, p 3

368. Rina Te Rehina Walker, brief of evidence, 27 June 2006 (doc R44), p 2

She went on to speak about the total immersion Māori language secondary school founded in 1998 and located first at the Tahuwhakatiki (Rimai) Marae and then at the former Pāpāmoa School site:

We can proudly say that some of the kids that have gone through our kura have changed and turned things around for their whanau. I think this is a really important point and it is what keeps me motivated and others as well. You see many of our whanau are still in a very poor state and the kids grow up in rough conditions – culturally, physically, socially and educationally. Often the parents of our students have little or no schooling and were the poor results of a Pakeha oriented education system. I know that our Maori and whanau focus can help turn that around.<sup>369</sup>

Ms Walker recounted some of the difficulties such schools encountered in meeting national administrative requirements for education:

I believe the current Government policy and structure does not match and align with the tikanga of our Kura and if we were to change our shape to fit into the Government's requirements as they currently are this would mean the loss of control by us of our students' education and purpose.<sup>370</sup>

In her view, 'the Government's education policy tries to bend and shape and mould us into their policy, which tends to run against our tikanga Maori.'<sup>371</sup> By the time of our hearings there was still a lack of provision for Māori-medium secondary education, and we were told by Colin Reeder of Ngā Pōtiki that his hapū was particularly concerned that children who had completed their primary schooling at Te Kura Kaupapa Māori o Otepou could not now continue their Māori-medium education at secondary level.<sup>372</sup> Rikirau Luttenberger, one of the foundation pupils of the kōhanga reo at Hairini in 1982, remembered it as 'an enriching and empowering experience' and added his plea for a Māori-medium secondary school in the area.<sup>373</sup> We understand that such an institution, Te Wharekura o Mauao – catering for Years 7 to 13 and drawing on a catchment of nearly 600 Māori immersion pupils at primary schools in the Tauranga and Te Puke districts – has since been established as a State school and was due to open at Bethlehem early in 2010.<sup>374</sup>

During our inquiry, we found that the position of te reo in the district's Māori communities is still giving cause for concern. The results of a questionnaire sent out in 1999 to

369. Document R44, p 5; see also (Rina) Te Rehina Walker, brief of evidence, 2000 (doc 16), pp 5–7

370. Document R44, pp 10–11

371. Ibid, p 11

372. Colin Reeder, brief of evidence, 26 June 2006 (doc R30), p 29

373. Rikirau Otmar Luttenberger, brief of evidence, undated (doc G16), pp 2, 4

374. Beca Carter Hollings & Ferner Ltd, 'Notice of Requirement – Te Wharekura o Tauranga Moana, volume 1', report prepared for Ministry of Education, 17 March 2009, pp 1–5, <http://content.tauranga.govt.nz/consents/RC14507/RC14507%20-%20volume%201.pdf> (accessed 12 October 2009)



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members of Ngāti Hangarau showed that only 31 of the 255 respondents (12%) stated that they were fluent in Māori; 42 (16%) said they had ‘average fluency’. Of the people in these two categories, 35 (48%) were over the age of 60 years, and 15 (21%) were under the age of 20 years. Mere Balzer emphasised in her report on Ngāti Hangarau that 72 per cent of the hapū respondents thus perceived that they had limited or no fluency in te reo Māori.<sup>375</sup> She quoted testimony from the oral history project conducted for the Ngāti Hangarau claim, with one man saying:

There are so few in Ngati Hangarau that are comfortable with our language. In terms of those that are on our paepae there are older ones in my own family who should be on the paepae before me, but they’re unable to speak the language and . . . that doesn’t just apply to our family, that applies to many other families and all those sort of things have I think affected or influenced the mana of Ngati Hangarau.<sup>376</sup>

In another survey, conducted for Ngāi Te Ahi in 2000, 19 per cent of the 75 respondents said they were fluent speakers of Māori, 31 per cent said they were ‘semi-fluent’, 27 per cent could understand but not speak Māori, and 23 per cent reported little or no knowledge of the language.<sup>377</sup>

In her report for the Tribunal, Leanne Boulton analysed the responses of Tauranga Māori to the 2001 census question about the ability to hold an everyday conversation in Māori. Data from these responses can be used as a crude indication of the proportion of Māori speakers in a population, although of course they cannot indicate in any detail levels of fluency in te reo Māori. In 2001, 28.5 per cent of Māori in the Western Bay of Plenty district indicated that they could hold a conversation about everyday matters in te reo Māori, slightly more than the national average (25.2%). The proportion varied considerably within the district, ranging from a high of 63.9 per cent on Matakana Island to a low of 13.6 per cent in Athenree. In the majority of areas (12 out of 19) for which data were available, the proportion of Māori able to hold a conversation in te reo Māori was below the district average of 28.5 per cent. The proportion in the Tauranga district (24.7%) was slightly below the national average. Again there was a considerable variation within the district, ranging from a high of 47.9 per cent in Kairua to a low of 15.2 per cent in Mount Maunganui North. In the majority of areas (16 out of 28) for which data were available in this district, the proportion of Māori able to hold a conversation in te reo Māori was below the district average of 24.7 per cent.<sup>378</sup>

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375. Document D25, p 31

376. Ibid, p 46

377. Garrick Cooper, ‘Ngāi Te Ahi Socio-Economic Survey Report’, 2000, p 5 (doc G2, appendix)

378. Document S5, pp 151–154

**9.6.4 Provision of services**

Our study of the health, housing, and education services provided by the Crown to Tauranga Māori since 1886 has revealed a mixed picture, in which useful and beneficial services existed alongside those that were clearly insufficient or inappropriate. Services provided by the Crown needed to be available to Māori citizens as fully as they were to Pākehā. It might also be expected that they would be designed to reduce or eliminate socioeconomic disparities between Māori and non-Māori. Some Government policies and measures were indeed targeted in this way, with the intention of making Māori and non-Māori conditions more equal, but others were not. Consequently, Māori remained disadvantaged. Later in the chapter we make an overall assessment of the Crown's provision of services to Māori in our inquiry district, in the light of Treaty principles.

**9.7 THE SUBMISSIONS OF THE PARTIES****9.7.1 Claimant submissions**

The closing submissions of claimant counsel on socioeconomic issues were in general agreement that Tauranga Māori are significantly disadvantaged in comparison with the total population of the district in such socioeconomic indicators as employment, occupation, income, educational qualifications, housing, and health.<sup>379</sup> Such a state of disadvantage does not accord with the legitimate expectations of Māori that, under the Treaty, Pākehā and Māori would benefit equally from the development of the nation.<sup>380</sup>

In terms of the Crown's degree of responsibility for that disadvantage, the claimants allege that:

- Left with only a small amount of land in the late nineteenth century, as a result of Crown actions, Tauranga Māori found it difficult to participate in the burgeoning economy and society of the region. In the twentieth century, the Crown did not cease land acquisition or provide effective protection from further land alienations. The Crown should have ensured that sufficient land was retained to meet the customary needs of the owners and to permit future development. Submissions on this topic

379. Counsel for Ngā Pōtiki, closing submissions, 24 November 2006 (doc U2), p 119; counsel for Waitaha, closing submissions, 12 December 2006 (doc U5(a)), p 59; counsel for Ngāi Tamawhariua ki Katikati, closing submissions and generic closing submissions on socioeconomic issues, 24 November 2006 (doc U6), p 7; counsel for Ngāti Hē, closing submissions, 24 November (doc U7), pp 40–41; counsel for Ngāi Tamawhariua, closing submissions, 24 November 2006 (doc U9), pp 26, 29; counsel for Ngāti Kuku (Wai 489), closing submissions, 4 December 2006 (doc U20(a)), pp 78–79; counsel for Ngāti Hinerangi and associated hapū, closing submissions, 5 December 2006 (doc U24), pp 29–31; counsel for Ngāi Te Rangi, closing submissions, [December 2006] (doc U31), pp 74–76; counsel for Ngāti Hangarau, closing submissions, [December 2006] (doc U38), p 23

380. Document U6, p 3; Submissions in reply for Waitaha, 13 March 2007, paper 2.656, p 15

varied in the extent to which they ascribed socioeconomic deprivation to land loss, but all of them identified a strong connection between the two.<sup>381</sup>

- The social and economic marginalisation of Tauranga Māori is also causally linked to government legislation and policies that governed the occupation and use of the land remaining in Māori ownership in the late nineteenth century. Fragmented ownership (an outcome of Crown land policy) was an obstacle to utilisation, management, and the financing of development. In their efforts to use and benefit from their holdings, Māori land owners were hampered in many ways by the policies of central and local government authorities, including through planning legislation and inappropriate rating policies. All of this contributed to the poor socioeconomic position of Tauranga Māori.<sup>382</sup>
- Land loss and the legislative regimes for Māori landholding had an ongoing negative impact not only on economic status but also on traditional leadership and social relationships, self-determination, tribal identity, and cultural well-being.<sup>383</sup>
- Since 1886 the Crown has failed in its obligation to give active protection to those hapū who retained little or no land, although it was aware that some hapū were in this position. The Crown was responsible for the landless state of these hapū, but turned a blind eye to their plight, despite repeated requests for help. It made little attempt to rectify the situation by providing land for them, or assisting them to develop an economic base that would enable them to participate fully in the benefits of economic development and prosper alongside the other residents of Tauranga Moana.<sup>384</sup>
- In general, the social services and amenities provided by the Crown for Māori in the region were not adequate. As citizens, Māori had the right to a level of services equal to that provided for other citizens. Indeed, given the vulnerable position of Tauranga Māori following raupatu, the Crown was also obliged to take further steps to eliminate socioeconomic disparities between Māori and other citizens. Services that did not accommodate Māori viewpoints were not appropriate.<sup>385</sup>

381. Counsel for Ngāi Tamarawaho, closing submissions, undated (doc N23), pp 43, 40–41; counsel for Ngāti Ruahine, closing submissions, 24 November 2006 (doc U1), pp 47–51; doc U2, pp 40, 43, 45–48, 52–53, 119; doc U5(a), pp 3–4, 57–59, 63–64; doc U6, pp 4–7, 9; doc U7, pp 40, 42; doc U9, pp 26–27; counsel for Ngāti Motai and Ngāti Mahana, closing submissions, 24 November 2006 (doc U11), pp 43–44; counsel for Ngāti Kuku (Wai 947), closing submissions, 27 November 2006 (doc U14), pp 47–48, 50, 53, 123–124; doc U20(a), pp 18–21, 79; doc U24, pp 32–33; counsel for Ngāti Te Ahi, closing submissions, [December 2006] (doc U33), pp 9–14; counsel for Ngāti Pūkenga, 10 December 2006, closing submissions, (doc U34), pp 14–16, 24–27, 74–75, 93; paper 2.656, pp 15–16

382. Document U1, pp 5–7, 49, 126, 131–133; doc U2, pp 52–53, 108–109; doc U5(a), pp 8–10; doc U6, pp 11, 13; doc U7, p 41; doc U9, pp 15–18; counsel for Ngāi Tūkairangi, closing submissions, 24 November 2006 (doc U12, pp 119–120; doc U14, pp 98–100; doc U20(a), p 18; doc U33, pp 14–15; doc U34, pp 11–13, 31–33, 65–68

383. Document N23, pp 3, 36; doc U1, p 134; doc U2, p 120; doc U5(a), pp 3, 5–6, 67; doc U6, pp 8–9, 15–16; doc U7, p 40; doc U14, p 124; doc U20(a), pp 56, 61; doc U31, p 16

384. Document N23, pp 3, 39, 41–42, 46–51; doc U2, p 119; doc U5(a), pp 3–4, 65–66, 68; doc U6, p 14; doc U9, p 30; doc U12, p 117; doc U38, p 23; paper 2.656, pp 15–16

385. Document U1, p 141; doc U31, pp 76–77; doc U34, pp 64, 70, 75, 92

- The Crown's efforts to provide health care for Tauranga Māori and address the problem of their ill health between 1886 and 2006 were not sufficient. In the earlier part of the period the provision of medical services was minimal, and financial barriers excluded many Māori from health care. Throughout most of the period, the health system was not culturally sensitive to Māori. Even today, more funding is needed for Māori health-care providers.<sup>386</sup>
- There has been a long history of substandard housing among Tauranga Māori, with adverse effects on health. Central and local government authorities knew about this situation for a long time but were slow to take any steps to address it, and statistics show that Māori in Tauranga are still disadvantaged where housing is concerned. The issues surrounding Māori housing in the district, including local government regulations and fees and the difficulty of raising finance for building on multiply owned land, are not fully resolved to this day, so that building houses on Tauranga Māori land is still very difficult. The Crown is under an obligation to ensure that Māori enjoy the same access to housing as non-Māori, and the onus is on central government to monitor local government policies to ensure that barriers to the development of housing on Māori freehold land are removed.<sup>387</sup>
- There was a failure on the part of the Crown to provide adequate education services. Low educational levels in native schools lowered the expectations and achievement of Māori pupils, which narrowed their employment opportunities by restricting them to low-paid unskilled positions. In addition, assimilationist policies and practices in the native schools and general school system, including the lack of acknowledgement of te reo Māori and associated traditional knowledge and custom, had a significant and ongoing adverse impact on the culture, identity and well-being of Tauranga Māori.<sup>388</sup>
- One submission described the cumulative impact of these acts and omissions on claimants as having engendered a 'state of profound dislocation, marginalisation and weakness'.<sup>389</sup> Another described the claimants as having 'been marginalised politically, socially, culturally and economically'.<sup>390</sup>

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386. Document U2, p 127; doc U6, p 15; doc U9, pp 12, 27; doc U31, pp 73–74, 77; doc U34, pp 69–70

387. Document U1, p 133; doc U2, p 126; doc U6, p 14; doc U12, pp 93–99, 131–134, 137; claimant counsel, closing submissions in regard to 20th century land alienation, development, and administration (issue 2), 24 November 2006 (doc U13), pp 45–51; counsel for Wai 227 claimants, closing submissions, undated (doc U16), pp 2–11; paper 2.659, pp 23–29; paper 2.660; pp 10–11, 29–30

388. Document U1, pp 139–140; doc U5(a), p 57; doc U6, p 14; doc U7, pp 41–42; doc U9, pp 12–13, 28; doc U34, pp 70–74, 92

389. Document U14, p 123

390. Document U31, p 14

**9.7.2 Crown submissions**

The Crown accepted that the available statistics indicate that the socioeconomic status of Tauranga Māori in 2001 was below the average of the district's total population.<sup>391</sup> However, Crown counsel submitted that:

- ▶ A causal nexus between land loss and current socioeconomic indicators is not proved. Land loss may have had some influence on the current socioeconomic status of Tauranga Māori, but the extent of that influence versus other factors is not clear, and there is an insufficient basis upon which any finding could be made on this matter.<sup>392</sup>
- ▶ At the beginning of the century, the Crown had a responsibility to ensure that Māori who alienated land were not left impoverished – a responsibility that it had endeavoured to meet by means of legislative provisions relating to landlessness.<sup>393</sup>
- ▶ There is an appropriate balance to be struck between the Crown's duty of protection and the right of Māori to alienate their lands if they wish, and it is an issue on which views have evolved over time. Further, there is no single Māori viewpoint on how the balance ought to be struck.<sup>394</sup>
- ▶ In terms of land development, the Crown had instituted effective measures at various times. Further, the development of Māori lands involves complex decisions about commercial success and failure, and the balancing of commercial imperatives with the cultural significance of land. Given the diversity of Māori opinions, Māori themselves should make decisions about how to develop their lands.<sup>395</sup>
- ▶ The extent to which social services are provided is a governance issue and is for the elected government to determine. Governments have to consider prevailing circumstances such as the availability of resources, and prioritise their allocation accordingly. Given the evidence on record, the Tribunal should be cautious in considering these issues because the full context of Crown actions and demands on its resources (including on a national scale) are not known. The adequacy of service provision needs to be placed in the context of what others in New Zealand, both Māori and Pākehā, were and are experiencing. It is important not to impose today's standards and reasonable expectations on the Crown actions and actors of the past. In whatever policy is adopted by governments, however, the Crown recognises a Treaty obligation under article 3 to accord its Māori citizens the same rights as non-Māori, treating them equitably or impartially in the prevailing circumstances.<sup>396</sup>

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391. Crown counsel, closing submissions: issue 6, 15 December 2006 (doc v30), pp 3–5

392. Ibid, pp 5–6

393. Ibid, p 6

394. Ibid, pp 6–7

395. Ibid, p 6

396. Ibid, pp 7–9

- ▶ The lack of comparative evidence makes it impossible to conclude that a lower level of health services was provided for Māori than for the rest of the Tauranga population. Criticisms of the medical services provided for Māori at particular times cannot be validated without corresponding analysis of the services provided for non-Māori. There were various Government health initiatives that did target Māori, and there is no basis for concluding that health services provided for Māori were of a lower standard than those provided for non-Māori in Tauranga.<sup>397</sup>
- ▶ There is no basis for accepting that Māori housing conditions in the past were below those of Pākehā in Tauranga. Even if they were, it is impossible to determine to what extent, because no comparative data was presented.<sup>398</sup> There have been successive measures to address Māori housing needs, dating from the passing of the Native Housing Act (1935), under which assistance was available only to Māori.<sup>399</sup> This facilitated the rehousing of Māori to a considerable extent in the post-war period.<sup>400</sup> It is however likely that finance for housing would have been available prior to 1935, from the Native Trustee and from Māori land boards.<sup>401</sup> In more recent times there have been other programmes, such as the papakāinga loans scheme.<sup>402</sup> To address the problem of building houses on multiply owned land, the Tauranga County Council introduced marae community zones in 1973 – the first such initiative in New Zealand, and predating the legislative requirement to make express planning provision for marae and their ancillary uses.<sup>403</sup>
- ▶ No evidence was provided to the Tribunal which compared the provision of education services for Māori with those provided for the rest of the Tauranga population. The evidence that was submitted does not support the contention that the Crown provided Māori with educational facilities that were inadequate (judged by the standards of the day), nor at a lower level than those provided for the general community.<sup>404</sup>
- ▶ In terms of undermining Māori language and culture, the relevant legislation of 1867 clearly favoured the teaching of English, and this would inevitably have had a detrimental effect on te reo Māori and tikanga Māori. However, it was a genuinely held belief at the time, and in subsequent years, that English was an important skill for Māori to acquire.<sup>405</sup>

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397. Ibid, pp 9–13

398. Ibid, p 15

399. Crown counsel, closing submissions: introduction and issues 1–2, 8 December 2006 (doc u26), pp 66–67

400. Ibid, p 68

401. Ibid, pp 66–67

402. Ibid, pp 63–64, 69

403. Ibid, pp 68, 72–73

404. Document u30, pp 9, 13–15

405. Ibid, p 17



**9.8 TRIBUNAL DISCUSSION, ANALYSIS, AND FINDINGS****9.8.1 To what extent did land loss contribute to the economic and social marginalisation of Tauranga Māori?****(1) Discussion of the facts**

On one side, the claimants asserted a strong connection between the negative socioeconomic indicators of the present day, and the past confiscation and alienation of Māori land. Crown counsel, however – while acknowledging that the confiscation and alienation of Māori land ‘had an influence’ on today’s socioeconomic situation – argued that a ‘causal nexus’ had not been proved. The Crown maintains that it is not clear to what extent land loss, as against other factors, contributed to the poor statistical position of Tauranga Māori in 2001.

Although the parties’ views of what constitutes a ‘causal nexus’ diverge, there are certain areas of agreement between claimants and the Crown. For instance, the Crown has not denied that the alienation of land from Tauranga Māori had some influence on their current socioeconomic status, as indicated by the 2001 census data, and the claimants did not deny that other factors might have been at work too. What is at issue is the relative importance of land loss, versus other possible factors, in explaining the twenty-first century statistics (and indeed, all previous data attesting to the long-standing socioeconomic deprivation of tangata whenua relative to the region’s Pākehā population). Neither the claimants nor the Crown argued that landholding was the only way in which Māori could have prospered. The claimants emphasised that, while owning land was of very high importance to them, retaining their ancestral holdings was, by itself, not enough to secure their well-being. Among other things, the quality of the land, and the availability of finance and expertise to enable its owners to develop it, were also vital considerations. We shall look at the latter issues in section 9.7.2.

**(a) Land loss: the economic consequences:** The impact of land loss on socioeconomic conditions was determined to a significant extent by the economic circumstances prevailing at the time of alienation. In 1886, Tauranga iwi and hapū retained only a little more than a quarter of their former land within the inquiry district (around 75,000 acres out of a total of some 290,000 acres). At the time, the Tauranga economy was based predominantly on farming. Further alienation of this already diminished land base was therefore very likely to have a negative socioeconomic impact. It was obviously difficult to participate in this economy (apart from labouring on farms owned by others) if there was little or no land to farm.

This is not to say that retention of the land would have guaranteed Māori prosperity, or that economic success was impossible without land. Nevertheless, in the late nineteenth century, a lack of land – or of useable land – was a serious disadvantage. It also threatened future Māori participation in the region’s economic progress, since land in Tauranga

became increasingly valuable over time, reaching extremely high levels of capital value in the latter part of the twentieth century. In this later period too, Māori – lacking a fair share of land resources – found development opportunities limited. Instead, these opportunities were grasped by others to whom Māori land resources had been transferred. Moreover, land alienation had continued to occur into the second half of the twentieth century, often against the wishes of the owners, in the face of mounting infrastructural requirements and other urban developments.

Lack of land led very early to Tauranga Māori being reliant, at least partially, on work for wages, increasingly vulnerable to economic fluctuations, and frequently unemployed. Although they had the advantage of living close to a developing regional centre – which, especially in the post-war period of rapid expansion, offered many employment opportunities – the positions available were mostly unskilled and only intermittently available. Furthermore, such jobs did not usually bring the high incomes that were needed to raise the workers in the socioeconomic scale. The flow-on effects from all this, for example on health, are clear. Professor Pool, in his authoritative study of Māori population history, has no difficulty in perceiving a connection between land loss and poor health. Māori vulnerability to malnutrition and ill health, he writes, was increased by the social and economic dislocation resulting from land alienation.<sup>406</sup>

It is beyond doubt that much land, indeed the bulk of it, was lost. It is also clearly evident that, as a group, Māori in Tauranga today occupy a lower position than the rest of the population of the district. We do not find it difficult to accept that the loss of such assets as landholdings brought about a reduction in economic options. Making a wider connection between land loss and socioeconomic deprivation is, however, more difficult, since negative economic and social indicators can spring from many factors. Successive Tribunals have recognised that demonstrating a link of this kind is not a straightforward exercise. The first substantial comment on this problem was made in 2004 by the Mohaka ki Ahuriri Tribunal, who observed that there were ‘immense difficulties in establishing a direct causal relationship between, on the one hand, land loss and, on the other, poverty, social dislocation, poor health and low educational achievement’. However, it went on to say that there was ‘*ipso facto*, a connection between land loss and poverty in cases where insufficient land has been retained for subsistence and insufficient income is available from intermittent part-time work to make up the deficit.’<sup>407</sup> It appears to us that this kind of direct outcome of land loss was certainly present for some groups in Tauranga Moana, and that it contributed to such negative indicators as substandard housing and poor health in the affected communities. In saying this, however, we also note that socioeconomic deprivation was not necessarily avoided when land was *not* lost, as we shall discuss at section 9.8.2.

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406. Pool, pp 62–63

407. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, p 679

(b) *Land loss: the intergenerational and cultural consequences:* It is not unreasonable to draw the conclusion that land loss, in an agricultural economy, led directly to reduced potential earning capacity. But there were also wider and less tangible ongoing impacts on later generations.

We have seen, for example, how in the early part of the period some whānau groups sought employment in the gum-digging industry because they lacked sufficient useable land. This meant taking their children out of school for several months while they were away on the gumfields, which affected the children's educational performance. This in turn affected their future employment options, and a cycle of disadvantage ensued, often with 'flow on' effects on the health and well-being of subsequent generations, and also their ability to take up the more highly paid occupations that became important in the expanding urban sector.

Involuntary land loss also contributed to a sense of disempowerment. Moreover, losing the land, or moving away from it because it provided insufficient income, had repercussions for traditional hapū structures and tikanga. As claimant evidence has emphasised, a sense of cultural malaise frequently developed: social structures decayed and cultural values declined, which in turn adversely affected confidence, economic initiative, and financial prosperity. This interrelationship between the changes in hapū life and the cultural well-being of Māori communities and individuals is difficult to quantify, but is nonetheless real.

(c) *Land loss and socioeconomic disadvantage: a causal nexus?* The Oxford Dictionary defines 'nexus' variously as: 'a connection or series of connections linking two or more things'; 'a connected group or series'; or (where the phrase is 'the nexus' rather than 'a nexus') 'central or focal point'. Thus, in terms of there being a *causal* nexus between land loss and socioeconomic disadvantage, the question is whether it is justifiable to conclude that land loss was, and remains, a causal factor in persistent Māori socioeconomic disadvantage. Land loss does not have to be the *sole* cause of the relative socioeconomic deprivation of the claimant groups for there to be a causal nexus. We can agree with the Crown that stating precisely what role land loss played is problematic. And we accept that a number of other causal factors, many of them beyond Government control, have also had an impact on past and present socioeconomic indicators.

Several recent Tribunals, after carefully considering the complex issues involved, have already made clear statements on the matter. The Hauraki Tribunal, for example, declared: 'We reject the suggestion that there is no connection between the wholesale acquisition of Maori land and the economic marginalisation of Hauraki Maori.'<sup>408</sup> In the Te Tau Ihu report, the Tribunal stated that, 'to a considerable extent, and principally, this [poor] socioeconomic position was the result of the fact that the iwi of Te Tau Ihu were left with insufficient

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408. Waitangi Tribunal, *The Hauraki Report*, 3 vols (Wellington: Legislation Direct, 2006), vol 3, p 1226

land for their present and future needs'.<sup>409</sup> The central North Island Tribunal, too, saw a causal link, saying: 'even though it is difficult to be exact about the nature of this link, there clearly is one, especially when land was expected to be a fundamental economic asset for Maori, and farming was expected to be a major development opportunity'.<sup>410</sup> This is consistent with the Crown's own acknowledgement to the United Nations Committee on the Elimination of Racial Discrimination that Crown actions leading to land loss 'usually' held back the potential development of the Māori owners concerned<sup>411</sup> – an acknowledgement that we discuss further below.

In the case of Tauranga, an examination of both the historical and more recent contemporary evidence presented to this Tribunal leads us to conclude that extensive land loss, along with the loss of associated resources, has been an important factor in the low socio-economic status of the Tauranga iwi and hapū relative to Pākehā, as well as in the diminishment of their social and cultural well-being.

**(d) Determining the Crown's role:** Even accepting that declining land ownership was a factor in the poor socioeconomic standing of later generations of Māori, it might be argued that the Crown's acts or omissions were not necessarily the cause of land alienation and thus of its consequent negative effects. Determining the role of Crown actions in the complex of changes affecting Māori life in Tauranga Moana is no simple matter. The movement of people away from ancestral lands, for example, was sometimes caused by developments that can be linked only tenuously to Government activities – among them (and particularly in the twentieth century) the opportunities brought by urban growth, as well as a rapid increase in Māori population numbers. Nevertheless, we have already seen in earlier chapters how Crown policies, practices, and omissions in the years since 1886 have been instrumental in much of the non-volitional loss of land and resources, and the Crown must bear some responsibility for the economic, social, and cultural consequences of this. (We have also noted that even supposedly 'volitional' land alienation could result from a range of factors, some of which might relate to Crown action or inaction.) Indeed, the Crown admitted the likelihood of a causal link between land loss and socioeconomic development (and a Crown role in that) in a statement made in 2000 to the United Nations Committee on the Elimination of Racial Discrimination. In reference to the guidelines it used for making Treaty settlements, the Crown acknowledged that 'where claims for the loss of land and/or resources are established, Crown breaches will usually have held back

409. Waitangi Tribunal, *Tē Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 2, p 1032

410. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 3, p 932

411. Committee on the Elimination of Racial Discrimination, 'Reports Submitted by States Parties under Article 9 of the Convention: New Zealand', 16 May 2006 (doc U24(a)), p 14

the potential development of the claimant group concerned.<sup>412</sup> Counsel for Ngāti Hinerangi, Mr Lawrence, who brought this document to the attention of the Tribunal, observed in his closing submissions that ‘if the Crown accepts the “causal nexus” in Geneva, then presumably it accepts it in Tauranga.’<sup>413</sup>

When this statement to the United Nations was mentioned during our hearings, the Crown responded by pointing out that the document stated that Crown breaches will ‘usually’ have held back potential development, not that there is in *all* cases a causal link between Crown actions and lack of Māori development.<sup>414</sup> Disentangling the role of the Crown from the effect of more general historical factors in land loss is certainly difficult, but we believe there is no basis for denying the Crown’s responsibility at least in part. Our considered view is that Tauranga does not form an exception to the ‘usual’ relationship between Crown actions and Māori disadvantage, as described in the Crown’s statement to the United Nations Committee on the Elimination of Racial Discrimination. Indeed, at our hearings the Crown did not attempt to argue that the Tauranga situation should be regarded as an exception.

## (2) *Treaty analysis and findings*

In chapter 2 we have already made findings on the Crown’s acts and omissions in relation to land alienation. In light of the evidence laid out in the present chapter, we agree with the Muriwhenua Tribunal which found it could ‘not accept that the Government had no responsibility for the social and economic consequences of land loss that flowed through to the twentieth century.’<sup>415</sup> The extent of that responsibility is often difficult to determine, and indeed may vary from case to case. However, the Tauranga stage 1 report has already cited Ngāi Tamarāwaho as ‘a clear example of a hapu that suffered economic deprivation as a result of landlessness.’<sup>416</sup>

The stage 1 report also found that the Crown had breached its duty of active protection towards Tauranga Māori, saying: ‘Much of the land retained by Maori as at 1886 was of little or no use in the economy of the late nineteenth century. In socioeconomic terms, Tauranga Maori suffered as a result.’<sup>417</sup> We believe this socioeconomic disadvantage constituted an ongoing ‘drag’ on the position of Māori which, under the principle of equity, the Crown should have taken steps to correct, and we discuss this further below.

In terms of the further land loss after 1886, in which the Crown was heavily implicated, the socioeconomic impacts are a little harder to evaluate in that, in a changing economy, we

412. Committee on the Elimination of Racial Discrimination, ‘Reports Submitted by States Parties under Article 9 of the Convention: New Zealand’, 16 May 2006 (doc U24(a)), p 14

413. Document U24, p 33

414. Addendum to Crown closing submissions, 15 December 2006 (doc U30(a)), pp 3–4

415. Waitangi Tribunal, *Muriwhenua Land Report* (Wellington: GP Publications, 1997), p 358

416. Waitangi Tribunal, *Te Raupatu o Tauranga Moana*, pp 364–365

417. *Ibid*, p 366

acknowledge that land ownership has gradually become less critical to economic success. Nevertheless, the ‘drag factor’ of earlier land loss should not be underestimated. Tauranga Māori lost ground (literally and figuratively) during precisely the period in which the foundations of New Zealand’s agricultural economy were being laid down: with insufficient land left to them, Māori were largely marginalised, except as a source of labour. It was a disadvantage difficult to overcome. We would observe, too, that economics are only part of the issue: we do not discount the socio-cultural aspects of land ownership and the likelihood of further land loss having an impact in that regard. We note the huge change in the character of areas such as Maungatapu and Whareroa during the mid-twentieth century, for example. Here, there had been thriving Māori communities which, in the space of a couple of decades, became entirely swallowed up by urbanisation. Land alienation resulted, forcing the majority of those who had been resident to uproot and relocate. As another example, we recall the discussion in chapter 2 (sec 2.11.1) of how the Crown’s actions led to some Māori in the west of our inquiry district losing a direct link to their lands on Rangiwaia. Indeed, ample claimant evidence has been quoted throughout this report, in relation to land alienation from a variety of causes, where the distress caused by land loss has been a common theme.

Overall, while it is impossible to determine the *extent* to which further land loss after 1886 might have contributed to the negative social statistics discussed at the beginning of this chapter, we are persuaded that there is a causal link. We acknowledge that land loss on its own is rarely a sufficient or necessary cause of socioeconomic deprivation *at the individual level*, but we are of the view that, at the hapū and iwi level, land ownership is hugely important, if not essential, to group identity and to social, cultural, and economic well-being. In failing to monitor the prejudicial impacts of land loss on hapū, particularly in regard to its own purchasing activities, we find the Crown in breach of its duty of active protection. In addition to this finding, we shall return to the plight of near-landless hapū at section 9.8.3.

### **9.8.2 Have the Crown’s legislative regimes for Māori landholding and development contributed to the marginalisation of Tauranga Māori?**

#### **(1) Discussion of the facts**

Although landholding, over the course of the twentieth century, may have gradually become less important as a factor in economic success, we need to consider whether, where land *was* retained, the Crown’s policies and legislation governing its use assisted Tauranga Māori to improve their socioeconomic position or, conversely, contributed to their marginalisation.

It is by now well accepted that individualisation of title undermined rangatiratanga and considerably weakened tribal control and authority. Individualisation also created handicaps that made it difficult for Māori to manage and profit from their ownership of land



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in later times. As the Stout–Ngata commission pointed out in 1907, it was impossible to separate issues of land legislation and policy from ‘the well-being of the Maori people.’<sup>418</sup> From the late nineteenth century onward, the Crown was aware that the system of multiple ownership meant that owners of Māori land were faced with problems not experienced by Pākehā landowners – notably an increasing fragmentation of title, a greater risk of alienation, and persistent inability to access development capital. These problems, despite some important Government initiatives such as the Māori land councils of 1900 and the land development schemes begun in 1929, remained throughout the twentieth century. The Hauraki Tribunal concluded, for example, after a detailed investigation, that

the kind of tenure created by the Crown and the modes of acquisition hugely disrupted Maori social organisation, fostered internal divisions, led to needless partitioning of land, and virtually precluded considered, long-term development planning on multiply owned land. The results were extremely damaging to Maori social and economic advancement.<sup>419</sup>

We believe the same was true in Tauranga Moana.

As well as tenure obstacles, there was also the problem of access to capital and expertise. In the wake of the depression years of the 1880s, Government assistance might reasonably have been expected: at the time, there were many complaints that Māori land was not being put to productive use, and other New Zealanders were receiving State assistance to own and develop land for farming. But, as we have discussed in chapter 3, development assistance was not extended to Māori until around the 1930s – a delay that cannot be regarded as in any way fostering the social and economic well-being of Tauranga Māori. The introduction of land development schemes thereafter did provide some much-needed help. However, at the same time, as we have seen, it often excluded owners for many years from direct control of their lands, thus diminishing their sense of agency. In some cases, the schemes also loaded the land with debt that took a long time to clear.

Some of the Crown’s other legislative measures to address the problems facing Māori landowners have tended to have more deleterious economic and cultural side-effects. For example, the compulsory reallocation of small shareholdings, known as ‘uneconomic shares’, shut out some Māori (and their future descendants) from any further participation in the ownership and development of their hapū or whānau lands, at the same time depriving them of their tūrangawaewae. We believe there has also been insufficient legislative protection of Māori landowners against injurious local body rating and planning regimes. As we saw in section 9.3.3, these brought multiple, and often mutually reinforcing, adverse economic and cultural effects that intensified during the period of rapid urbanisation, often also creating a sense of powerlessness among Māori.

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418. AJHR, 1907, G-1C, p 15

419. Waitangi Tribunal, *The Hauraki Report*, vol 3, p 1229

On the other hand, in the second half of the twentieth century, the increasing use of trusts and incorporations played a part in overcoming some of the problems of multiple ownership, enabling several Tauranga iwi and hapū to develop their lands and resources as commercially viable entities for the benefit of their members.

**(2) *Treaty analysis and findings***

We have already made findings on general issues of land ownership and development in chapter 3 and we do not repeat them here, although they remain relevant insofar as these issues have a bearing on socioeconomic outcomes. The evidence presented to us suggests that the Crown's policies and legislative regimes surrounding Māori land ownership and development – while clearly not the sole cause of the economic and cultural marginalisation of claimant iwi and hapū in the Tauranga district – have in many respects been a contributing factor.

The Tribunal's first report on Tauranga Moana found that the Crown failed to ensure that the tangata whenua possessed the means to develop their residual land, thus neglecting its duty to actively protect Māori communities and their ability to share in the economic and social benefits of national progress. While the Crown did, over the period examined in our present report, increase its development assistance to Māori, there were aspects of land-holding and land-development policy and legislation that did not contribute to the social and economic well-being of Māori and did not meet the duty of active protection. Further, where the Crown failed to provide Tauranga Māori with the same access to development opportunities as other citizens, we find that it breached the principle of equity. We believe the Crown also neglected its duty of active protection by failing to ensure that local authority rating and planning regimes did not threaten the ability of Māori to retain and utilise their land as they wished. In this context, we particularly note the failure of such regimes, for much of the twentieth century, to provide for Māori, where they so wished, to maintain a community lifestyle based on communal landholding.

**9.8.3 Did the Crown meet its obligations to those hapū left with little or no land?**

**(1) *Discussion of the facts***

In section 9.5, we described, as examples, the particular experiences of Ngāi Tamarāwaho and Ngāti Hangarau (of Ngāti Ranginui) and Ngāti Makamaka (of Ngāti Te Rangi) – three hapū who approached the Government about the plight they found themselves in as a result of confiscation and other Crown actions before 1886. We also noted the downstream effects of landlessness on Waitaha and Ngāti Te Pukuohākoma. From the 1890s onwards, the Government was told regularly about the situation of various Tauranga groups who had been left landless (or virtually so), and senior Ministers of the Crown promised to address

their predicament. In 1908, the inadequate extent of Māori landholdings in Tauranga County was also highlighted by the Stout–Ngata commission.

But although the Government knew for a long time that a significant minority of Tauranga Māori were virtually landless, it did nothing to remedy that situation by making land or other resources available, or even by investigating precisely how many people were landless. When specific cases of alleged landlessness in Tauranga were brought to the Government's attention, perfunctory investigations were made by officials whose dismissive reports were accepted by higher authorities without question. Government Ministers paid lip-service to assisting landless or near landless iwi and hapū, but neglected to do so.

Further, the Crown's failure to respond to repeated requests for assistance by landless Tauranga hapū occurred at the very time that Pākehā were receiving significant State assistance to obtain and develop land. Meanwhile, hapū left impoverished and landless after 1886 continued to suffer from their disadvantaged situation into the twentieth century, with successive generations also affected.

Assistance did not need to be in the form of land grants: other assistance options not based on land (such as the fishing industry) could reasonably have been explored, as pointed out by claimant counsel.<sup>420</sup> We know of no such proposals. But nor was it impossible for the Crown to have made grants of land. This had happened in the 1880s when the plight of 'landless natives' in the South Island was publicly acknowledged. After investigations by a Government commission, Marlborough Māori, for example, were allocated land (40 acres per adult). In another scheme, 50 acres per adult were allocated to Māori in the Buller area. Another inquiry in the 1880s also highlighted the situation of certain Ngāi Tahu. Later, a landless natives commission was established, in 1893, and land allocations were subsequently made and formalised in the South Island Landless Natives Act 1906.

We accept that those initiatives were far from satisfactory. The Ngāi Tahu and Northern South Island Tribunals noted that, although officials did look for suitable land on which to place landless Māori, their priority at the time seemed to be to find land on which to settle Pākehā (and also to establish State forests). Compared with the effort and expense put into acquiring land for Pākehā settlers under the Land for Settlements Act 1894, and acquiring land for scenic reserves, little was devoted to the landless natives scheme. The Government admitted in 1906 that the Crown had been slow to settle the legitimate grievances of landless Māori, and the Native Minister, Carroll, said it had been 'a blot on our colonial reputation to have allowed these claims to remain unsettled and undetermined for so many years'.<sup>421</sup> In addition, some of the land designated for use as reserves for the 'landless natives' of the South Island was never made available for occupation, and much of the land that was occupied was remote and of inferior quality.

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420. Document v5(a), pp 65–66

421. 4 September 1906, NZPD, 1906, vol 137, p 318

But despite these failings, more than 7000 acres was allocated to 198 Marlborough Māori and taken up by them, as a result of the schemes.<sup>422</sup> More than 115,000 acres was allocated to about 3300 Ngāi Tahu people (though little was ever occupied by the beneficiaries – an outcome memorably described by the Ngāi Tahu Tribunal as ‘a cruel hoax’).<sup>423</sup> Inadequate though it may have been, it was at least action of some kind. In Tauranga, by contrast, the plight of hapū left with little or no land received no official recognition from the Government, and the action taken was nil. The allegations made to this effect by the claimants did not, we note, meet with any response from the Crown during our hearings.

### **(2) Treaty analysis and findings**

The first Tauranga report, looking at the events surrounding the Sim commission (1927) and the Tauranga Moana Māori Trust Board Act (1981), found that the Crown failed to deal adequately with the legitimate claims of Tauranga Māori concerning raupatu.<sup>424</sup> Here, we are concerned not with raupatu as such, but with its socioeconomic impact on hapū unduly affected by confiscation and its aftermath. More particularly, we are concerned about the long history of failure to remedy the complaints put before the Government by those hapū.

Our investigations lead us to conclude that, after 1886, the Crown committed a serious breach of its duty to give active protection, in that it failed to assist those Tauranga hapū who retained little or no land even though it was aware of their position. We have drawn attention in particular to the plight of Ngāti Hangarau, Ngāi Tamarāwaho, and Ngāti Makamaka but, as we have seen from the evidence of others, such as Waitaha and Ngāti Te Pukuohākoma, they were not alone. Part of the action required was to take complaints seriously and to inquire fully into them. The inadequate efforts of the Crown to investigate grievances, even when promises were made by senior Ministers, fell short of what was required and breached the principle of partnership by failing to act in good faith.

The Crown's inaction also breached the principle of redress. Grievances arising from past actions of the Crown, and the prejudice arising from those actions, required rectification of the wrong sustained and the loss resulting from it. Effective means of restoring the economic and social base of the affected hapū, however, were not found, or even explored – even though measures were taken to remedy the grievances of landless Māori in the South Island. Although the Crown was largely responsible for the near-landless state of some Tauranga hapū, it failed to offer remedy by providing other land for them, or by otherwise assisting them to develop an economic base that would enable them to participate fully in the benefits of economic development and prosperity in Tauranga Moana.

422. Waitangi Tribunal, *Te Tau Ihu o Te Waka a Maui*, vol 2, p 669

423. Waitangi Tribunal, *Ngai Tahu Report*, vol 3, pp 993, 996, 1000

424. Waitangi Tribunal, *Te Raupatu o Tauranga Moana*, pp 396–397

**9.8.4 Did the health services provided for Tauranga Māori between 1886 and 2006 fulfil the Crown's obligations under the Treaty?****(1) Discussion of the facts**

Several hapū claimed that the health services they received in the period since 1886 were inadequate. As we see it, this is in part an assertion that health services for Māori in Tauranga have been inferior to those provided for non-Māori. As citizens of New Zealand, Māori were of course entitled to health services equal in level to those offered to other citizens. Crown counsel fully concurred with this. However, they argued that Māori entitlement to health services was not unlimited, since governments had to prioritise the allocation of resources. We can accept this, but it does not remove the Crown's obligation to make every effort (as far as circumstances permit) to eliminate all barriers to services to which Māori were entitled as citizens. The Crown told us that lack of comparative evidence makes it impossible to conclude that the level of health services for Māori in the Tauranga district was lower than the level of services provided for rural Pākehā in the late nineteenth and early twentieth centuries. Certainly, fuller evidence about what health services existed in the district at different times, and the extent to which they were available to Māori and non-Māori, would have enabled us to come to firmer conclusions on this issue. Nevertheless, we believe that sufficient evidence has been placed before us to conclude that there were areas of health care provision where the service to Tauranga Māori was clearly not on a par with that provided to Pākehā. A particular instance of this was in access to hospital care prior to the mid-twentieth century (although we do also note a reluctance on the part of some Māori at that time to enter hospital). Government officials were clearly aware that there was a problem with the local Hospital and Charitable Aid Board refusing to accept Māori patients, but rarely did anything to intervene.

Nor do we think it unreasonable to have expected the Crown to make targeted provision for Māori health. Crown counsel cautioned us against imposing today's standards and expectations on the Crown actions and actors of the past, but the evidence shows that, from 1840 onwards, Māori health was recognised as a special case that required special solutions, and in some areas of care did receive targeted medical services. The distribution of medicines by native school teachers, a service not available in ordinary State schools, indicates the Crown acknowledged a duty to Māori in health care – as does its (short-lived) subsidisation of medical practitioners in Māori districts. This duty continued to be acknowledged in the various public health (and housing) initiatives directed at Māori throughout the twentieth century.

Had this extra provision in some areas of health care compensated for inadequate provision in others, and produced equitable outcomes for Māori, there might be no case for the Crown to answer. However, the persistence of poor health outcomes for Māori relative to

Pākehā – as outlined in section 9.6 – suggests that more, rather than less, attention should have been paid to specific Māori health needs.

**(a) Provision and effectiveness of health services:** The Tribunal's *Napier Hospital and Health Services Report* found that 'from the inception of British rule in New Zealand, protecting Māori health was on the official agenda.'<sup>425</sup> The evidence shows this to have been the case in Tauranga and, clearly, it would be far from the truth to say that the Crown ignored the health needs of Māori. Indeed, provision was made for Māori health services from an early date, by various means. Examples include the free supply of medicines through the native schools, the appointment of native medical officers to provide free treatment to 'indigents', the establishment of a Māori public health system under the Public Health and Māori Council Acts of 1900, and the appointment of native health nurses to work in Māori communities. From the 1920s, and especially from the 1930s, a wide range of public health programmes were put in place by the Crown. Some of them were particularly concerned with Māori health issues, and by the 1960s the tuberculosis control programme had played a large part in reducing the ravages of this disease among Māori. All health services were expanded and improved as the twentieth century progressed. In the latter years of the century, as the health policies of the Crown became much more attuned to the particular needs and wishes of Māori, the way opened for services provided 'by Māori for Māori'. The Government facilitated the establishment of a number of these Māori health providers in Tauranga Moana.

But beneath this structure of apparently comprehensive Crown provision of health care for Māori, certain deficiencies existed. Although the late nineteenth century was a particularly difficult time for Tauranga Māori and there were many reports of poverty and ill health among them, the level of medical services provision was greatly reduced in 1888 with the cessation of the subsidy given to the native medical officer appointed for the district. This meant that most Māori in the district were entirely dependent on the rudimentary services of medically untrained native school teachers, supplemented by occasional visits by medical practitioners who were authorised to attend serious outbreaks of disease. No other primary medical services were provided without charge, or supplied specifically for Māori. This was at a time when professional medical intervention was valued as the most effective weapon against illness, yet medical services and hospital treatment were not easily accessible for Māori. That remained the case until universal health benefits were introduced under the Social Security legislation of 1938.

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<sup>425</sup> Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), p85



## 9.8.4(1)(b)

Later there were more comprehensive public health initiatives designed to address important Māori health problems. These were entirely appropriate attempts to direct public resources towards improving unsatisfactory conditions in Māori communities. As Papaarangi Reid and Bridget Robson observe in a recent publication:

[an] obsession with ‘treating everyone the same’ comes without acknowledgement of the need to treat people differently to achieve equal outcomes. . . . Equity . . . doesn’t necessarily mean shared equally, but rather acknowledges that sometimes different levels of resources are needed to reach equal outcomes.<sup>426</sup>

It is in the last 25 years that considerable progress has been made in providing more culturally appropriate health services at a national level. In 1986, the Director-General of Health observed that ‘Concepts of health are firmly based in Maori culture (which according to the Treaty has a right to official recognition and protection) and Maori people have a right to appropriate services – funded through our health system.’<sup>427</sup>

Unfortunately, we received no information about how the Crown’s mainstream health services have provided for Māori in the Tauranga district from the 1980s onwards. Claimant testimony indicates that, over the last quarter of the century, the perception has remained among Tauranga Māori that existing mainstream health services are not fully providing for their situation, particularly by failing to take account of distinctive Māori needs and wishes regarding health. The emergence of Māori health providers was a response to concerns such as these, and while the Crown eventually approved and facilitated the development of organisations providing health care ‘by Māori for Māori’, as a supplement or alternative to mainstream health services, assertions were made by some claimants that Māori health providers are still not sufficiently supported by the Crown.

Our general conclusion is that while the Crown did not ignore the health needs of Māori, for many decades it did not adequately address them. Some services were developed specifically for Māori, but they were not provided in a fully satisfactory way: the Tauranga Māori council, for example, failed to fulfil its potential as an agent for improving Māori health and living conditions, and this was attributable at least in part to inadequate Crown resourcing. Furthermore, the health services available to the general public were sometimes difficult for Māori to access, owing to a combination of financial barriers and cultural inappropriateness. It is here that the claimants’ allegations of inadequacy appear to us to have substance.

**(b) The Crown’s role:** The evidence outlined in section 9.5.1 demonstrates that notably poor health conditions and high mortality rates prevailed among Tauranga Māori in the late nineteenth century. Indeed, in the decades after raupatu, Tauranga Māori were experiencing

426. Papaarangi Reid and Bridget Robson, ‘The State of Maori Health’, in Malcolm Mulholland, ed, *State of the Maori Nation: Twenty-first-century Issues in Aotearoa* (Auckland: Reed Books, 2006), p 22

427. George Salmond, quoted in Durie, p 85

precisely the kind of disadvantageous situation that the framers of the Treaty, aware of the repercussions of colonialism on other indigenous peoples in America and elsewhere, had aimed to prevent. Even at that time, the Government was aware of the link between economic hardship and disease, but the few steps it took to address the poor health situation of Tauranga Māori were far from adequate. We recognise that, in part, this reflected the undeveloped state of scientific medical knowledge – as well as the limited financial resources of a young colony and the much narrower view of the State's role in social matters that prevailed at the time. In other respects, however, the provision made within the limits of what was conceivable in the nineteenth century was smaller than what might have been expected. Moreover, the 'diseases of poverty' (such as typhoid and tuberculosis) among the Māori population in the Tauranga district persisted long after they had been greatly reduced among Pākehā. This suggests that, even though the Government's efforts increased as it took greater responsibility for the health of its citizens, they were still insufficient for Tauranga Māori.

While there were undoubtedly great improvements in Māori health in the second half of the twentieth century (as witnessed by the declining rates for infant, maternal, and TB mortality, and a rise in life expectancy), the health advances made by Māori did not bring them to a situation comparable with that of other citizens, whose health was also improving greatly. Even today Māori nationally are worse affected than non-Māori by almost every known health problem – even though the greater availability of information about Māori health and health improvement strategies since the mid-twentieth century might have been expected to encourage the Crown to undertake more affirmative action to reduce the disparities. There is no indication that this nationwide disparity does not exist in Tauranga Moana also.

## **(2) Treaty analysis and findings**

In determining what level of services the Crown had an obligation to provide to Māori, and whether this obligation was fulfilled in Tauranga Moana, we turn first to the citizenship rights conferred on Māori by article 3 of the Treaty. Under the principle of equity, Māori were, and are, entitled to Government health services at the same level and of a standard equal to those received by other citizens. The Tribunal's *Napier Hospital and Health Services Report* sets out at some length the nature of the Crown's Treaty obligations to provide health services to Māori. The panel's view was that while 'beneficial outcomes *cannot be assured for individual Maori*', it was legitimate to expect 'a *general equality of health outcomes for Maori*' as part of the general benefits of citizenship granted by the Treaty (emphasis in original).<sup>428</sup> We agree.

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428. Waitangi Tribunal, *Napier Hospital and Health Services Report*, p xxvii

General equality in health outcomes for Māori, as part of the community of citizens, was not possible if Māori were excluded from health services. We have not seen evidence that formal exclusion occurred in Tauranga, and indeed a wide variety of beneficial services were made available. However, access to services was sometimes restricted by barriers of various kinds. The Crown's inability to resolve the issues arising from the hospital funding regime represented a failure to adhere to the principle of equity. Although hospitals were governed by local authorities, they had been delegated the responsibility for providing secondary health services, and it was the Crown's duty to clarify funding and lines of responsibility to ensure that these services were provided on an equal basis. As the Napier Hospital and health services Tribunal observed, 'whether the Crown's health agencies are part of the Crown or exercise delegated authority, the Crown holds undiminished responsibility for ensuring that its Treaty obligations in respect of Maori health are fully discharged'.<sup>429</sup> Another example of the Crown's poor monitoring of funding and other issues is seen in the uncertainty about whether local authorities were responsible for helping Māori communities obtain safe water supplies. Here, unsatisfactory oversight by the Crown meant that Māori often received inferior services and experienced adverse health effects. To the extent that Māori access to health services was restricted, for whatever reason, a breach of the principle of equity occurred.

The failure to ensure equitable access to hospitals and to safe water supplies also breached the duty of active protection. Another specific example from the early part of the period is the termination in 1888 of the subsidy for general practitioner treatment. This deprived Tauranga Māori of access to a State-supported primary health care service, which, though undoubtedly modest, provided significant benefits at a time of great medical need and economic difficulty. Other inadequacies were detailed in section 9.5.1. Looking at the matter in its broadest perspective, we can say that the duty of sheltering Māori from the negative impact of settlement – an obligation accepted by those who framed the Treaty – clearly included the task of safeguarding them from introduced diseases, and from any other harmful effect of colonisation on their health. The *Napier Hospital and Health Services Report* helpfully explained that this protection was to be offered against the 'transitional' effects of settlement: the promise of such protection 'did not establish a permanent Maori entitlement to additional health service resources as distinct from that of New Zealanders as a whole' (emphasis in original).<sup>430</sup> In other words, the protection was directed at reducing a perceived risk, for as long as the risk was deemed significant. In modern phraseology, this constitutes affirmative action to remove adverse health disparities for Māori as a population group.

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429. Waitangi Tribunal, *Napier Hospital and Health Services Report*, p xxiv; see also pp 31–34

430. Ibid, p xxv

That Māori health outcomes were markedly worse than those of Pākehā for such a very long period, and that this disparity has long been well known (and still exists), indicates a failure of active protection by the Crown. It points to an inadequate determination to reduce disparities by such health strategies as were available at different times (insofar as health conditions are amenable to medical intervention, since other factors are also always at work). The Crown was obligated to do all it could to bring Māori health standards to a position of equality with those of Pākehā. We concluded above that, while efforts were not lacking, they were not enough to achieve that goal. This failure was a breach of the principle of active protection.

The Crown also has obligations, under the principle of partnership, to provide Māori with health services that are culturally appropriate. To quote the *Napier Hospital and Health Services Report* again, respecting the principle of partnership means ‘enabling the *Maori voice* to be heard; allowing *Maori perspectives* to influence the type of health services delivered to Maori people and the way in which they are delivered; empowering *Maori to design and provide health services* for Maori’ (emphasis in original).<sup>431</sup> This means avoiding monocultural approaches to health-care delivery.

The recognition of tikanga Māori in delivering health services is obviously important, but we received little evidence about the extent to which this aspect of partnership has been acknowledged in Tauranga’s mainstream primary and secondary health services. We therefore cannot make a finding in respect to the Crown’s delivery of mainstream services in Tauranga.

With respect to health services delivered under iwi or hapū authority, or services provided ‘by Māori for Māori’, we believe that the emergence of Māori health providers as an option for the delivery of health services has been an important advance towards true partnership (and also the recognition of rangatiratanga), and has enormous potential for producing better health outcomes. Again, however, we are not in a position to make firm findings as these services are still, in many instances, in their early phases of development. We simply state that the Crown’s obligation is now to ensure that Tauranga Māori organisations are supported adequately in any existing or future efforts to deliver culturally appropriate and medically effective health services to their own people.

Lastly we note the *Napier Hospital and Health Services Report*’s reminder that health services ‘can deliver *only part of the package* leading to equal health outcomes’ (emphasis in original).<sup>432</sup> In this context, it is to be hoped that the Government’s new ‘Whānau Ora’ programme will deliver on its promise of more holistic and multifaceted assistance to families facing socioeconomic difficulties (including health problems).

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431. Ibid, p xxvi

432. Ibid, p xxvii

Turning now to the question of prejudice, although poor health outcomes arise from a variety of factors, medical intervention clearly plays an important part in improving health conditions. Since the Crown is obligated by the Treaty principles of equity, active protection, and partnership to provide adequate and appropriate health services to Māori, or to see that they are provided by other agencies, its acts and omissions must be scrutinised closely. The claimants have not alleged that the Crown failed entirely in its health care provision for Māori, but that its efforts were inadequate. We have established that, in several respects, its efforts did indeed fall short of the standard required by the Treaty. While a duty to Māori was recognised, and a great many good things were accomplished, the services the Crown provided for the protection and improvement of Māori health could not, when considered as a whole, be described as ‘adequate’. To the extent to which poor health outcomes were due to Crown acts and omissions with regard to health services, the hapū of Tauranga Moana were prejudiced by these breaches.

**9.8.5 Did the housing assistance provided for Tauranga Māori between 1886 and 2006 fulfil the Crown’s obligations under the Treaty?**

**(1) Discussion of the facts**

Pointing to the lack of comparative historical Māori and Pākehā housing data on the record of inquiry, Crown counsel argued that there is ‘no basis’ for stating that Māori housing conditions in Tauranga were inferior to Pākehā conditions.<sup>433</sup> However, if housing conditions had been the same for Māori and Pākehā, Tauranga would be an exception to the national situation. In 1988, for instance, the Crown’s advisory National Housing Commission made particular mention of Māori housing problems, pointing out that of the households in New Zealand recognised as being in ‘serious housing need’, a disproportionate number (51 per cent) were Māori.<sup>434</sup>

We acknowledge that there is no comparative information for Tauranga, at least for the majority of the period. But there is clear evidence, in the form of RW Pomare’s careful 1936 survey and a range of other historical material, that Māori housing conditions in the Tauranga district were often substandard, and that this remained the case for a very long time. The national survey completed in 1965, for example, indicated that one quarter of Tauranga Māori houses were substandard and overcrowded. The housing data in Boulton’s analysis of the 2001 census results show that Māori home ownership levels were at that time inferior to Pākehā levels, and that Māori houses were more crowded. Such evidence cannot be overlooked.

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433. Document U30, p 15

434. National Housing Commission, p 229

We accept the Crown's assertion that it has not ignored Māori housing needs.<sup>435</sup> Successive measures have been introduced to address the problems, including: action taken by the Māori councils and native health officers in the early 1900s; houses built on the land development schemes of the 1930s and 1940s; loan facilities made available under the 1935 Native Housing Act (including provision from a special fund for particularly needy cases); the post-war State housing programme; the intensified Māori Affairs rehousing programme of the late 1950s and early 1960s; the papakāinga housing loans established in the 1980s; and other schemes of more recent times. Nevertheless, continuing evidence of Māori housing problems, as well as the unequal housing situation revealed in the 2001 census data, call into question the adequacy of the Crown's policies. Equality of housing standards between Māori and non-Māori in Tauranga Moana has clearly not been achieved.

The first legislative action specifically addressing Māori housing needs was not taken until 1935. The effectiveness of the Native Housing Act of that year was restricted by the fact that relatively few Māori could qualify for the loans offered, as they required a secure title to the land, a sizeable cash deposit, and an ability to make repayments at a certain level. Despite knowledge of the poor housing conditions of Tauranga Māori in the 1930s – further evidenced by health problems, including the high incidence of tuberculosis among Māori, which were recognised as being directly related to poor housing conditions – the Crown's rehousing programme commenced very slowly. And even though the programme was accelerated in the 1950s and 1960s, a high proportion of Māori in the district were still living in unsatisfactory housing in 1965. It does not seem unreasonable to conclude that the persistence of poor housing conditions had a negative effect on the general well-being of the people concerned.

In addition, for some years in the crucial mid-century period, the Government's 'integration' policy led to the practice of 'pepper-potting,' whereby Māori homes were scattered among others in the new suburbs. We acknowledge that pepper-potting was part of a wider programme of providing modern housing conditions close to amenities and employment opportunities, and that one of its aims was to avoid ghettoisation – the creation of segregated and possibly marginalised Māori peri-urban communities. But we recognise, too, that the policy made it more difficult for Māori to choose to live in their own communities on their traditional land, and had the effect of diluting hapū culture. This is unfortunate as, although much land had been lost from Māori ownership, there was still a certain amount of land in multiple title on which they could have been rehoused without being cut off from the opportunities offered by the growing urban economy – and also without breaking their ancestral ties with the land or being denied their continued participation in a hapū-based style of living if they so wished.

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435. Document u26, pp 66–68



9.8.5(2)

Meanwhile, planning restrictions introduced by local authorities, as required by parliamentary legislation, impeded the development of suitable housing on Māori land that was zoned rural. And housing on Māori land that had been incorporated into Tauranga borough faced soaring rates because of rapid economic growth and urbanisation after the Second World War.

Having considered the history of Crown policies for Māori housing, we agree with the opinions expressed by Riri Ellis, a claimant witness, who told us that there was

a lack of systematic proactive policies to progress Maori housing, consistent with customary Maori practices, which I believe is the responsibility of the Crown. . . . [Nor is] Maori housing . . . a high priority for local government. We could easily reach the conclusion that Maori housing is hampered by excessive compliance issues and local government regulations. Add into the mix the complexities of Maori land tenure, multiple ownership and financial impediments and you have a situation in which Maori housing is not on an equal footing with . . . non-Maori housing.<sup>436</sup>

We acknowledge that developing housing policies to meet a variety of Māori needs may not have been straightforward, yet until the closing decades of the twentieth century, there is little evidence of attempts to involve Māori in formulating these policies, to consult with them about their nature and impact, or to respond to Māori complaints about them.

Property rights include not only ownership rights but use and enjoyment rights. If Māori landowners wish to live on their land, we are of the view that the Crown should not unreasonably impede that aspiration. Our main concern in this chapter has been the impact of Crown policies on the social and economic welfare of Māori in Tauranga. Alongside the other implications of the rating and zoning regimes applied to Māori land (discussed in earlier chapters), we emphasise again the importance of affordable housing for physical health and social well-being, and of community oriented residential patterns, where desired, for the fostering of cohesive hapū relationships.

**(2) Treaty analysis and findings**

We have already made findings about the rating and zoning laws applied to Māori land in Tauranga Moana. Here we focus particularly on the implications of these regimes, and of Government policies concerning Māori housing, for the health and social well-being of Māori in this district.

As with Māori health conditions, the Crown recognised a problem with Māori housing and periodically attempted to address it. The provision of services in this sphere came very late, however, and fell short of the level required by the principle of active protection. Clearly, a good standard of housing is an important factor in maintaining good physical

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<sup>436</sup>. Document Q10, pp 12–13

health and also conditions promoting social well-being, yet the data presented to us from the 2001 census revealed that the housing situation of Tauranga Māori, relative to Pākehā, continues to be poor in the present century.

The State's targeted Māori housing policies since the 1930s acknowledged a responsibility to cater for the distinctive needs of Māori and help lift their housing standards closer to those of non-Māori citizens. This recognition of an obligation to bring about greater equity in the sphere of housing was laudable, but barriers such as title difficulties and zoning restrictions were still allowed to hinder effective action. Although the Government gave useful assistance to Māori willing to build houses or rent from the State in town, there are still, today, obstacles facing people who want to build new dwellings on ancestral land. Difficulties such as these set apart aspiring Māori homeowners from their Pākehā counterparts, and the failure of the Crown to resolve this situation, or require local authorities to do so, represents a breach of the principle of equity. In failing to support Māori to achieve their aspirations, the Crown has also breached the principle of autonomy.

It was not until relatively late in the late twentieth century that the Crown attempted to consult with Māori about achieving culturally appropriate solutions to their housing needs in Tauranga. Cultural differences in landholding have been recognised in the development of papakāinga housing schemes and the like, but the progress made has not ended the legal, financial, and planning problems experienced by Māori wishing to house themselves in a Māori setting and with consideration for Māori community values. Much of the responsibility for managing housing development lies with the local authorities, and many advances have been made. But the Crown has not yet fully met its obligation to see that Māori wishes to build on their own land are respected. This is contrary to the principle of partnership, and we encourage all parties to persevere with the ongoing task of resolving the problems that still exist.

#### **9.8.9 Did the education services provided for Tauranga Māori between 1886 and 2006 fulfil the Crown's obligations under the Treaty?**

##### **(1) Discussion of the facts**

Schooling was available to Māori children in Tauranga Moana throughout our period. As the network of Education Board schools grew, more and more children – both Pākehā and Māori – could attend them. In addition, native schools were established in or near centres of Māori population. Which type of school provided better teaching for Māori in Tauranga is difficult to say, as the little evidence we received was ambiguous on this point. Access to some kind of school, however, does not appear to have been a problem in the inquiry district.

There is some evidence that physical conditions in the native schools were unsatisfactory at times, but in the absence of comparative information about rural board schools, we

cannot conclude that native schools were generally less well equipped or maintained than other schools in the district – particularly in the earlier period when amenities of all kinds were often rudimentary. Undoubtedly, the education available in native schools was often disrupted in the 1880s, 1890s, and the early twentieth century by epidemics and other ill-health, and by migrations to the gumfields. These factors affected educational attainment, but did not in themselves indicate inadequate provision of educational facilities.

Our inquiry has not had the benefit of a systematic and comprehensive review of what educational services and support the Crown offered Tauranga Māori. In particular, we were given little information about educational policy and initiatives in the period following the Second World War. It is clear, however, that for most of the period, across the nation as a whole, the Crown's expectations for Māori educational achievement were not high. Whether this was different from what was expected for rural Pākehā children is hard to say. Certain individual pupils managed to emerge from the system with high qualifications, but educational policies seem to have been based on the view that the vast majority of Māori children were destined for farm work or unskilled labouring employment of various kinds, and were less suited to secondary and tertiary education than their Pākehā counterparts. It does not appear unreasonable to assume a link between these policies and the fact that Māori in Tauranga have historically been disproportionately employed in unskilled manual labour. Census results, even in recent times, have demonstrated that Tauranga Māori are under-represented in all tertiary and secondary occupational categories, and over-represented in unskilled primary occupational categories. Income and qualification levels indicate a similar pattern. Employment of this kind provided a livelihood for many, especially in prosperous times, but left waged workers vulnerable to the vicissitudes of the economy. This situation had an impact on the socioeconomic status of Tauranga Māori for most of the twentieth century.

For claimants, school policy concerning language use and the effects of this on te reo Māori was the key educational issue. Many were deeply concerned that te reo is still endangered, and we agree that educational policy and practice is an important factor in determining what place the language occupies in the community. On the question of whether the native schools system undermined Māori language and culture, the Crown acknowledged that the relevant legislation of 1867 clearly favoured the teaching of English, and that 'this would have had an inevitable detrimental effect on use of te reo Maori and tikanga Maori'. Crown counsel added, however, that it was genuinely believed at the time, and subsequently, that English was an important skill for Māori to acquire.<sup>437</sup> We agree that knowledge of English was necessary, but note that it was provided at the expense of an important aspect of Māori life and culture. The situation is different now, and the emergence and growth

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437. Document U30, p17

of Māori-medium education in recent decades has been an encouraging development. To what extent the Crown played a part in the decline of te reo Māori by discouraging its use in schools in the past remains an important issue, however. We mentioned some aspects of language policy in the native schools, but it is relevant to note that more Māori children in New Zealand were in board schools than native schools by 1909. Clearly, too, schools were not the only influence on the degree to which language and culture were retained, especially in areas like Tauranga that were close to towns and Pākehā-settled areas. Protecting Māori language and culture did not seem important to the Crown until comparatively recently. The complexity of this matter, however, and the limited evidence we have available for the situation in Tauranga, means we could not include it fully in our inquiry or make findings on it. We nevertheless urge the Crown to continue its support of initiatives designed to strengthen te reo.

### **(2) Treaty analysis and findings**

The evidence presented to us about education policy and outcomes in the twentieth century was by no means comprehensive, and does not permit us to arrive at detailed findings. Nevertheless, it is apparent that some ideas and policies in the educational sphere indicated a limited vision for Māori vocational advancement, and served to restrict educational opportunities. In addition, there was a general failure by the Crown to give adequate attention to the issue of poor Māori educational achievement relative to Pākehā. These faults in the educational system had far-reaching economic and cultural impact on the claimant hapū, by reducing their chances of participating fully in the development of the region, and thus contravened the principle of mutual benefit and the duty of active protection.

## **9.9 CHAPTER SUMMARY**

In this chapter, we have seen that Crown acts and omissions in many spheres have affected the quality of life enjoyed by Tauranga Māori. The evidence we reviewed demonstrated clearly that Māori have long occupied a place in Tauranga's economy and society that was inferior in several ways to the position of non-Māori.

Our investigation of why this situation has arisen found that while there were certainly other factors, part of the blame must be laid on the massive loss of land since the nineteenth century raupatu and its aftermath. The iwi and hapū of Tauranga were left in a disadvantaged position from which they found it very difficult to recover, economically or socially. Government policies for managing the remaining Māori land, including its alienation and development, did not help bring about a better situation in most cases. In fact, the legislative regime was itself often a factor in the difficulties faced by those who owned the land.

Moreover, the plight of some of the hapū worst affected by land loss was never addressed, despite repeated pleas for assistance. In all these matters, we found that the Crown acted in ways that were inconsistent with the principles of the Treaty of Waitangi.

When we reviewed the services the Crown provided for Māori in Tauranga, we found a mixed picture. Although often hampered by the limited extent of the evidence, we investigated health, housing, and education services, as best we were able. Services in these areas were certainly made available in Tauranga, but in a number of respects they were less useful or accessible to the Māori of the district than they should have been. In any case, they were not effective in eliminating the gaps between Māori and non-Māori socioeconomic conditions.

Although it would be difficult to show that all such disparities can be modified by Government action, appropriate remedial efforts are part of the Crown's duty to Māori. Policies or special measures designed to achieve greater equality between Māori and non-Māori, or to reduce disparities between them, are fully consistent with the Treaty (and are not new in New Zealand history). Targeted measures of this kind are called for when Treaty breaches in the past have left a hapū or iwi, or any Māori group, economically or socially disadvantaged. Their objective is to improve Māori social and economic conditions, and to reduce or eliminate disparities between Māori and non-Māori. Our conclusion is that, in a number of instances, the Crown failed to fulfil its duty to provide appropriate services to Māori in the inquiry district.

#### 9.10 MAIN CONCLUSIONS AND FINDINGS IN THIS CHAPTER

The main conclusions and findings in this chapter are as follows:

- ▶ Analysis of the census data for 2001 shows that Tauranga Māori are significantly disadvantaged, in relation to the non-Māori population of the inquiry district, across a wide range of socioeconomic indicators.
- ▶ The enormous loss of land that occurred before 1886, and further loss of land almost to the present, contributed to the economic and social marginalisation of Māori in the Tauranga district. Through its acts and omissions, the Crown is heavily implicated in land loss in Tauranga Moana and thus the negative socioeconomic impact of land loss on Tauranga Māori. In focusing on individuals, and failing to monitor the social, cultural, and economic impacts of land loss on hapū and iwi, the Crown failed in its duty of active protection.
- ▶ Some hapū were particularly badly affected by loss of land through raupatu and other Crown actions. The needs of several such groups were repeatedly brought to the attention of the Crown, and investigation was promised, but no effective action was taken.

This constitutes a serious breach of the principles of good faith and redress, and of the duty of active protection.

- ▶ The legislative regimes for Māori landholding, including the laws and policies governing the use and development of Māori land, often reduced the ability of Tauranga hapū to share in the economic and social benefits of regional progress.
- ▶ Health services were provided for Māori in Tauranga from an early date, but they were minimal for many years. Services, including those targeted at Māori, were greatly expanded in the 1920s and afterwards, and financial barriers were eased by the Social Security Act in 1938. However, little acknowledgement of the need for culturally appropriate services was made until recent decades. Due partly to the work of official health services, the health status of Māori in Tauranga improved enormously during the twentieth century. However, it still lags behind that of non-Māori, which suggests that the Crown's obligation to reduce or eliminate disparities was not adequately met.
- ▶ The Crown was slow to address the housing needs of Māori, although they were clearly evident and obviously had a negative effect on health. Loan assistance was provided by legislation in 1935, but it was many years before it was widely accessible. Although considerable rehousing was achieved in the 1950s and 1960s, much of it located in new urban subdivisions, Māori housing standards in Tauranga are still not equal to those of non-Māori, even today. In particular, many Māori who aspire to build on their ancestral lands are still disadvantaged by legal, rating, planning, and financial constraints not encountered by aspiring Pākehā homeowners, which represents a breach of the principle of equity. Further, in failing to support Māori to achieve their aspirations, the Crown has breached the principle of autonomy.
- ▶ Māori children in Tauranga Moana had access to State primary schools and a number of native schools throughout the period, and later were able to attend secondary schools. But for many years the Crown's expectations for Māori educational achievement were not high, and there was a failure by the Crown to give adequate attention to the issue of poor Māori educational achievement relative to Pākehā. There appears to be a relationship between this history and the over-representation of Māori workers in unskilled or lower-paid employment. We thus find that, overall, the Crown breached the principle of mutual benefit. We also examined the relationship between the decline of te reo Māori and the Crown's policies concerning language use in schools, but made no finding on the matter.





## CHAPTER 10

### LANDBANKING

#### 10.1 INTRODUCTION

We have one residual issue to discuss before we sum up the content of this report and make our recommendations. It is a discrete and contemporary issue relating to the Crown's policy on landbanking. In October 2005, Ngā Pōtiki lodged a claim (Wai 1328) objecting to changes to that policy, introduced by the Office of Treaty Settlements (OTS) in 2004 and implemented in 2005. The claimants contend that those policy changes are likely to be prejudicial to present and future generations of Ngā Pōtiki and are inconsistent with the principles of the Treaty of Waitangi.<sup>1</sup>

#### 10.2 WHAT WAS THE NATURE OF THE CROWN'S 2005 LANDBANKING POLICY CHANGES?

In 1993, a protection mechanism for surplus Crown land was established and 15 regional landbanks set up to hold land and properties that could be used in Treaty of Waitangi settlements. An early review of the system, in 1995, resulted in the establishment of a Crown settlement portfolio specifically for raupatu areas. This was 'in recognition of the severity of confiscation and because there is often very little land remaining in Crown ownership in the areas where confiscation occurred'. Thereafter, all surplus properties in these areas were automatically landbanked, without assessment, and there was no fiscal cap on the value of properties accumulated.<sup>2</sup>

In 2003, OTS conducted a further review of its landbanking policy. The review was motivated by a desire to avoid incurring holding costs for properties that claimants are unlikely to seek as redress. To assist in achieving that end, it was resolved to discontinue the practice of having three separate types of landbank – regional; Crown settlement portfolio (raupatu areas); and claim specific – and instead to consolidate all properties into the

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1. Counsel for Wai 1328 claimants, closing submissions, 4 December 2006 (doc U22), pp 3–6

2. Minister in Charge of Treaty of Waitangi Negotiations, 'Review of Protection Mechanisms and Landbanking Processes', memorandum for Cabinet Policy Committee, undated (doc T12, app 4, doc 2), pp 3–4

regional landbanks.<sup>3</sup> Former Crown settlement portfolio areas would now form raupatu sub-areas within the regional landbanks. Under the proposal, the Tauranga raupatu area would be administered within the Bay of Plenty regional landbank. As before, there would be no financial cap on the value of landbanked properties in a raupatu area. But whereas surplus Crown properties in raupatu areas used to be landbanked automatically, without being advertised, OTS now advised that such properties would be ‘advertised through the Protection Mechanism process’ so that claimants could make application for properties of particular interest to them. OTS assured Māori that ‘properties in Raupatu Areas will [still] be considered for landbanking whether or not any application is received for landbanking,’ but then went on to stress that it was nevertheless ‘important to make an application, as the additional information provided may increase the chances of the property being landbanked.’<sup>4</sup>

The steps in the protection mechanism process are as follows: when Crown properties are deemed surplus, OTS directly notifies individuals or groups on its mailing list, and also, on a regular monthly basis, places a public notice in national weekend newspapers. Individuals or groups then complete an application form giving specific reasons why a property should be landbanked, and submit it to OTS. The applications are assessed by an inter-departmental officials committee against a set of Cabinet-approved criteria which include a consideration of the site’s cultural or historical importance and any proposed future use by the claimant group after settlement. As noted above, however, properties in raupatu areas are automatically assessed by the committee even if no application is received from claimants. Following the committee’s assessment, the Minister of Māori Affairs, the Minister in Charge of Treaty Negotiations, and the Minister of Finance (‘the Joint Ministers’) decide whether property is landbanked or released for disposal. Applicants are advised of the decision.<sup>5</sup>

In mid-February 2004, claimants were advised of these proposed changes by letter, with a map attached showing the landbanks as then configured, and were given until the end of March 2004 to respond.<sup>6</sup> Over 900 letters were sent out, and 15 responses received.<sup>7</sup> The proposals were approved by Cabinet in July 2004 and implementation of the new policy was delegated to the Joint Ministers. Among matters flagged for their attention was the

3. Andrew Hampton, ‘Review of the Landbanking Process’, Office of Treaty Settlements pro forma letter, 29 June 2005, pp 1, 5 (doc R31, attachment 2), pp 6, 10)

4. Ibid, p 2 (p 7)

5. Office of Treaty Settlements, *Protection of Māori Interests in Surplus Crown-Owned Land: Information for Applicants* (Wellington: Office of Treaty Settlements, 2005) (doc T12, app 1, doc 1), pp 4, 6, 10–11, 15

6. Document T12, p 7; Jenny Raven, ‘Review of Protection Mechanisms and Landbanking Processes’, Office of Treaty Settlements pro forma letter, 12 February 2004 (doc R31, attachment 3); Heather Baggott, under cross-examination by Cathy Ertel, fourth hearing, 1 November 2006 (transcript 4.6, pp 121–122, 125); Office of Treaty Settlements, ‘Implementation of Changes to Landbanking Processes’, paper to Associate Minister in Charge of Treaty of Waitangi Negotiations and Ministers of Finance and Māori Affairs, 18 April 2005 (doc T12, app 6), app 1

7. Minister in Charge of Treaty of Waitangi Negotiations, ‘Review of Protection Mechanisms and Landbanking Processes’, Cabinet Policy Committee briefing paper, POL(04)151, 28 June 2004 (doc T12, app 4, doc 1), pp 1–2, 4

need to review the existing portfolio of landbanked properties. Some 11 months later, the new policy was finally ready for implementation and claimants were advised of the fact by letter.<sup>8</sup> Included in the letter was notification about the intended review of landbanked properties. During the review, the letter said, persons on the protection mechanism mailing list would be notified and have the opportunity to make submissions about the properties already held, including the extent to which they were 'of significance to them as redress'.<sup>9</sup> At the time of our hearings, the review of Tauranga landbanked properties had not yet begun. Cross-examination elicited the information that around 41 properties were at that stage held in the Tauranga subarea of the Bay of Plenty Regional landbank and that it was proposed to review approximately 30 of these. The target for completing the review was late 2007.<sup>10</sup>

### 10.3 CLAIMANT SUBMISSIONS

Ngā Pōtiki claim that the new OTS policy does not comply with the Treaty because it diminishes protections previously afforded: it does not guarantee that all surplus Crown properties will be landbanked, nor does it recognise the impact of raupatu. It is claimed that the new policy was developed in response to alleged failures in landbanking that do not apply to Tauranga Moana. It is also claimed that the policy changes were developed and imposed without full or meaningful consultation with Tauranga Maori.<sup>11</sup>

### 10.4 CROWN SUBMISSIONS

The Crown maintains that the new policy is a 'reasonable and measured response' to landbanking issues that have arisen over a number of years, and it enables continued claimant input into landbanking decisions.<sup>12</sup> As claimants are not tending to choose large numbers of landbanked properties for their Treaty settlement redress, it is unreasonable to expect the Crown to continue to hold properties that are expensive to maintain and will probably not be needed for settlement. There is still no financial cap in raupatu subareas of regional landbanks, and surplus properties will automatically be considered for inclusion even if no tangata whenua submission is made. An interdepartmental officials committee will always take into account the position of a property within a raupatu area when considering whether or not to landbank it. With regard to consultation about the new policy, the Crown

8. Document T12, p 7

9. Ibid, p 9

10. Transcript 4.6, pp 135, 141–142; doc T12, p 9

11. Document U22, pp 8–10

12. Crown counsel, closing submissions: landbanking, 22 December 2006 (doc U41), p 13

contends that its letter of 12 February 2004 clearly explained the nature of the policy change, and invited response from tangata whenua.<sup>13</sup>

#### 10.5 TRIBUNAL DISCUSSION, ANALYSIS, AND FINDINGS

It is useful to address two distinct aspects of the claim in turn: first, whether the policy changes are Treaty-compliant, and secondly, whether the consultation and implementation process for the policy change was adequate.

##### 10.5.1 Is the new policy on landbanking Treaty-compliant?

We largely confine ourselves here to discussing the landbanking policy changes as they affect Tauranga claimants, and we begin by noting that some changes have not occasioned their adverse comment. Claimants have not, for instance, expressed any concern about the new landbank structure whereby the Tauranga raupatu area has become a subarea of the Bay of Plenty regional landbank. Nor did they make submissions about the Crown's expressed intention to dispose more speedily of those properties *not* chosen by claimants as settlement redress.<sup>14</sup> What concerns them most is, first, the need to apply for properties to be landbanked and, secondly, the mechanisms for reviewing existing landbank holdings.

As we have seen, from 1995 to 2005 surplus Crown properties in raupatu areas were landbanked automatically, with no cap on individual or overall value, to be held for possible use as redress in future Treaty of Waitangi settlements with claimants in those areas. The Crown, concerned that numerous properties being held were unlikely ever to be needed for settlement, sought some means of rationalising the selection of properties for landbanking in raupatu areas, and also of evaluating existing holdings with a view to some properties being sold off.

The evidence shows that, as at 2004, there were 797 properties held nationally in landbanks and of these, 239 were in raupatu areas. The number then listed for Tauranga was 43, with a total value of around \$16.5 million.<sup>15</sup> In cross-examination, Heather Baggott of OTS gave the number held as 41.<sup>16</sup> Figures provided to Cabinet indicated that, based on recent settlements in other raupatu areas, the settling claimants had been choosing to accept, on average, fewer than 18 per cent of available properties. That said, while no properties at all had been chosen in some areas, the figure stood at around 25 per cent in others.<sup>17</sup>

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13. Document U41, pp 4–5

14. Document T12, app 4, doc 2, p 8

15. Ibid, p 5

16. Transcript 4.6, pp 135, 141–142

17. Document T12, app 4, doc 2, p 5

As Crown counsel pointed out, the courts found in the case of *New Zealand Māori Council v Attorney-General* (the *Lands* case) that ‘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 [to a State-owned enterprise].’

The court did state, however, that where such transfer of Crown land was at issue, a ‘reasonably effective and workable safeguard machinery is what is required.’<sup>18</sup> We see the landbank situation as analogous, in that it concerns property held by the Crown and potentially subject to transfer out of the claimants’ reach. The question for us, therefore, is whether the Crown can satisfy itself, reasonably and in good faith, that particular pieces of land or property will *not* be required for settlement of claims in the Tauranga raupatu area – and whether, as part of its evaluation process, it has put ‘reasonably effective and workable’ safeguard machinery in place to protect claimant interests.

As we have seen, landbanking in the past involved two scenarios: if the property was in a raupatu area, it was automatically landbanked without evaluation; if it was in any other area, it was publicly notified under the protection mechanism scheme and claimants had to make a case for it to be considered for landbanking. Under the new policy since 2005, claimants in raupatu areas have lost the protection of land automatically being landbanked. Instead, a weaker protection has been introduced whereby the property will be automatically *considered* for landbanking. As we understand it, the claimants are not *required* to make application, but the chances of the property being landbanked will rise if they do. There are thus again two matters for our examination: the impact and the process involved. First, in order to ascertain in global terms the likely impact of the change, what has been the ‘pass rate’ of properties considered under the protection mechanism scheme in the past? Secondly, to ascertain the fairness of the process, what criteria are used to decide whether a property will be landbanked or not, and how much of a burden is it for claimants to have to make an application?

In terms of the first question, we have little information to go on. Under cross-examination, Ms Baggott said she did not have figures for how many properties had been considered nationwide and how many of those had actually been landbanked. She agreed, however, that the acceptance rate would never reach 100 per cent.<sup>19</sup> We can thus be certain that the policy change will have at least some impact on Tauranga claimants, although we cannot know the extent.

As set out in a briefing paper to Cabinet, the protection mechanism criteria (effectively the Crown’s ‘safeguard machinery’) are that:

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18. *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (CA) at 664–665 per Cooke P (doc u41, p13)

19. Transcript 4.6, p137



## TAURANGA MOANA, 1886–2006

10.5.1

- a. the applicant has a Waitangi Tribunal claim or endorsement from claimants to act on the claimant group's behalf, and the property is within the boundaries of that claim;
- b. the applicant has provided clear reasons on either:
  - ▶ the cultural or historical importance of the property; or
  - ▶ its intended future use after settlement; or
  - ▶ specific features of the property that mean it is not substitutable. These features may include that the property is specifically the subject of a claim;
- c. the property fits within the financial limit of the claims area; and
- d. the Crown accepts the claimants' reasons. The Crown may decline a property for protection if the holding costs are likely to be significant relative to the importance of the property demonstrated by the applicants.<sup>20</sup>

As already discussed, the financial limit does not apply to properties in raupatu areas, and the remaining criteria seem to us not unreasonable as long as claimants have indeed been able to put forward a case that reflects the property's importance to them and that the case is given serious consideration. We have a concern, however, that where such a case has not been made, for whatever reason, evaluation of the property's 'importance' rests with the Crown alone. Probed on how this exercise might be carried out, Ms Baggott said: 'We have access to historians in the office [of Treaty Settlements] and we often access whatever historical reports are available.'<sup>21</sup> We would hope that OTS would also carry out checks as to whether the property was specifically the subject of a claim. That said, the evidence contains a clear statement from Mr Hampton of OTS that 'the additional information provided [in an application] may increase the chances of the property being landbanked.'<sup>22</sup> Further, we have no assurance that the absence of an application is not taken by the Crown as betokening a degree of *disinterest* in the property on the part of the claimants. Clearly, then, an application is desirable. This hurdle constitutes a further reduction in protection: it necessitates proactive monitoring of public notices by the claimants and then the drawing-up of a case for any properties of interest.

How much of a burden does the application process represent for claimants? According to Mr Hampton's letter of June 2005, public notices are placed monthly in the national press, listing surplus Crown properties available for possible landbanking. People on OTS's mailing list are directly 'notified of the advertisement' (although it is not clear whether a copy of the actual advertisement is provided).<sup>23</sup> We also note that information on currently available properties can be accessed via OTS's website.<sup>24</sup> Questioned as to how often Tauranga

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20. Document T12, app 4, doc 2, p 3

21. Transcript 4.6, p 134

22. Document R31, p 7

23. Ibid, p 2

24. Office of Treaty Settlements, 'Māori Interest in Surplus Crown-Owned Land', Office of Treaty Settlements, <http://www.ots.govt.nz> (accessed 5 March 2010)

properties become available for possible landbanking, Ms Baggott said it was ‘not like they come up every month’. She thought it was more likely ‘a couple a year maybe’ and that, as at late 2006, it was perhaps around two years since any Tauranga property had been landbanked.<sup>25</sup> On the one hand, this indicates that the burden of checking and submitting applications is not great; on the other, it means that claimants must not let their vigilance drop in terms of checking for properties of possible interest.

Once such a property has been identified, the claimants need to complete an application form. OTS’s information booklet states that this must normally be done within 30 working days of the date of the property being advertised. For those with internet access, copies of the application form are downloadable from the OTS website. Alternatively, forms can be obtained by writing to OTS. The form itself is not long but claimants are advised: ‘If you provide little or no supporting information, this will significantly reduce the likelihood of the property being recommended for landbanking.’<sup>26</sup> As claimant counsel commented, working out how best to make a good case is ‘not just something you sit around the kitchen table and do in five minutes.’<sup>27</sup> For our part, we would observe that although the need to complete an application would not occur frequently, it is a significant hurdle that did not formerly exist. Further, the various changes that we have outlined above, taken together, have a clear cumulative impact and, overall, we are very concerned that they result in less protection for greater effort. We will return to this point in our findings below.

In terms of the one-off exercise to review properties already held, we can see that in non-raupatu areas there might be benefit to claimants as well as to the Crown: given the fiscal cap on landbanked properties in such areas, a review might help identify some properties that could be sold so as to create ‘headroom’ to landbank others of greater significance to the claimants. In raupatu areas, where there is no such cap, the benefits would appear to be entirely one-sided in that the aim is solely to reduce holding costs for the Crown.

Nationally, as we have seen, the list of landbanked properties stood at around 800 in 2004. Of those, it appears that some 500 had not previously been assessed against the protection mechanism criteria and it was therefore decided that three ‘tests’ would be applied to them. Those tests were that the properties:

- i. have high holding or other associated costs, and/or;
- ii. are situated in towns or areas where there are already a number of similar properties held in the landbank, and/or;
- iii. have leasehold interests or known encumbrances/problems that may limit claimants’ ability to use or develop the property.<sup>28</sup>

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25. Transcript 4.6, p 135

26. Document T12, app 1, doc 1, pp 7–8; Office of Treaty Settlements, ‘Application for Landbanking of Surplus Crown-Owned Land’, application form, undated (doc R31, attachment 2, app 1)

27. Transcript 4.6, p 135

28. Document T12, app 6, pp 4, 8

Properties falling within any of these categories would become subject to review. Also to be added were any properties that had been damaged or vandalised, or that were incurring higher holding costs than initially anticipated. The result of the exercise was a list of some 350 properties, the majority of which were ‘concentrated within the areas of Whanganui, Taranaki, Bay of Plenty (including Tauranga) and the Far North.’<sup>29</sup> That figure represents more than 40 per cent of the total number of properties landbanked at the time.<sup>30</sup>

For the Tauranga area, we were told at hearing that a much higher percentage – about 30 of the 40 or so properties then held (75 per cent) – ‘might potentially come up for review’ and that this was likely to happen sometime in the ensuing 12 months.<sup>31</sup> Ms Baggott gave to understand that there would be consultation with any mandated bodies in the area before the list was finalised and notified:

When the officials involved in the review get to Tauranga, they’ll go through a process of going through those 41 and comprehensively applying the tests and criteria and coming up with a list. If there are any mandated bodies in Tauranga at the time who have their mandate recognised by the Crown in the next twelve months the Crown will then sit down and talk with those mandated bodies about that list.<sup>32</sup>

We have received no update on whether the review exercise has yet been carried out but, in our view, the preparation of perhaps some 30 applications to support the retention of listed properties represents a substantial burden of work. Indeed, Ms Baggott acknowledged as much, and also conceded that – other than information – no assistance would be provided to claimants to help them complete the task. She did, though, suggest it might be possible to stagger submission of the applications rather than putting them all in at once.<sup>33</sup>

The Crown says that it would be ‘unreasonable to require the Crown to continue to hold properties which are unlikely to be selected as redress or which incur high holding costs when there is a low likelihood of claimants choosing them as redress.’<sup>34</sup>

As an example of the need to rationalise holdings, Ms Baggott pointed to the problem of uneven spread: if numerous properties were held in one specific area, she suggested, then first there would likely be too many for just that one hapū, resulting in some properties not being taken up, and secondly there would not be enough properties for other hapū elsewhere.<sup>35</sup> As we understand it, however, the situation for raupatu areas is not an ‘either/or’ scenario: since there is no cap on total value, the holding of a number of properties in one specific location should not limit the ability to acquire properties in other locations within

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29. Document T12, app 6, pp 4, 6

30. Transcript 4.6, pp 129–130, 132–133; doc U22, p 21

31. Transcript 4.6, p 135

32. Ibid, p 142

33. Ibid, pp 136–137

34. Document U41, p 14

35. Transcript 4.6, p 124

the raupatu area. Secondly, as claimant counsel pointed out, it is common in Tauranga Moana for there to be ‘areas of joint influence’ and for several hapū to have interests in any given location, so the portfolio of properties in that location may need to be split several ways.<sup>36</sup> The scenario of ‘too many properties for one hapū’ is therefore unlikely to apply.

Ms Baggott also pointed to properties with leasehold interests or known encumbrances as being the sorts of properties unlikely to be chosen as part of settlement redress.<sup>37</sup> While we acknowledge the possibility that such properties might be less appealing to claimants, we also accept claimant counsel’s point about the limited availability of properties for landbanking in the Tauranga area.<sup>38</sup>

As we have already noted, Ms Baggott herself conceded that surplus Crown-owned properties do not ‘come up every month’, which is perhaps not surprising given much of the district was alienated to private owners following the raupatu and that there has been significant urbanisation since then. Nevertheless, it would be interesting to know what became of the confiscated land that was set aside as reserves for ‘Native purposes’, ‘educational purposes’, and ‘Native benefit’ generally. Some, at least, as we saw in chapter 9, has been used for State schools. The fate of other areas is much less clear and might warrant investigation, since it is conceivable that some might remain in Crown ownership.<sup>39</sup>

In short, any properties landbanked in Tauranga have the potential to be of interest to claimants as settlement redress, whether encumbered or not. As claimant counsel said: ‘Unfortunately for the Tauranga Moana claimants, they are not able to be choosy about what land or property they will have.’<sup>40</sup> It is thus highly questionable whether the Crown’s figures for uptake in other raupatu areas, which they point to as being low, will have relevance to Tauranga since none appear to involve any highly urbanised locations comparable with Tauranga.<sup>41</sup>

That brings us to the issue of particularity. The Crown has, in various inquiries in the past, acknowledged general issues of breach – for example, in relation to the operation of the Native Land Court – but has demanded that they be demonstrated as applicable to particular circumstances and particular claimant groups. We see no reason why the Crown itself should not be held to a similar standard. While it is not at all unreasonable for the Crown to be mindful of costs in relation to administering settlement assets, we would not expect it to extrapolate from the experience of other claimant groups and apply the result, willy-nilly, to the situation in Tauranga. In that context, we note that the Crown is being

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36. Document U22, p 15

37. Document T12, p 8

38. Document U22, pp 16–17

39. Evelyn Stokes, *The Allocation of Reserves for Māori in the Tauranga Confiscated Lands*, 2 vols (Hamilton: University of Waikato, 1997), vol 1 (doc A57), pp 167–184; see also Waitangi Tribunal, *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* (Wellington: Legislation Direct 2004), pp 267–277

40. Document U22, p 17

41. Document T12, app 4, doc 2, p 5. The figures cited are for the Ngāti Tama, Ngāti Ruanui, Ngāti Tūwharetoa ki Kawerau, and Ngāti Awa settlements.

increasingly flexible in its settlement negotiation process and we would hope that the same flexibility could be demonstrated in relation to its landbanking process.

In terms of holding costs, we acknowledge that the Crown has a duty to exercise restraint in activities that involve use of money from the public purse. Claimant counsel's argument was that expenditure on property maintenance is likely to be recouped when the Crown either uses the property as part of a settlement package or, in the event of non-selection by the claimants, sells the property off.<sup>42</sup> However, we would note that there is an opportunity cost in tying that money up for long periods of time: it is Crown money that is not available for other things the public might reasonably expect the Crown to provide. That said, we are of the view that the Crown's future capacity to remedy injustice should weigh heavily in the balance when it is assessing the landbanking situation in raupatu areas.

### 10.5.2 Treaty analysis and findings

The claimants did not, so far as we are aware, take issue with the Crown's landbanking policy as it stood before the 2005 changes. Indeed, applying the *Lands* case finding, by analogy, to the landbanking process, we find that there is no Treaty breach in the Crown disposing of any surplus land and property not required for the settlement of Treaty claims. In the context of raupatu areas, however (and particularly Tauranga) we have concerns about the Crown's new process for deciding which properties are needed and which not.

Since 1995 the Crown itself has recognised the need for additional protection of claimant interests in raupatu areas. Despite that, it has introduced changes because of its perceived need to address its own budgetary concerns. As we have outlined above, the cumulative effect of those changes is that the process offers less protection than previously and it demands that claimants be much more proactive. Given there is still *some* measure of protection, we do not find that the Crown has entirely failed in its duty of active protection. However, the Crown has a duty to remedy past breaches and we would urge that the special situation of the Tauranga claimants be taken into account. There is a need for particularity. Tauranga Māori lost a large part of their land during the raupatu and have lost more since. There is an increasingly urbanised environment, and they have little chance of recouping much of what they lost. The removal of *any* protections is therefore of concern and we would urge the Crown to assist the Tauranga claimants by adequately resourcing them to comply with the new policy. If tangata whenua do not undertake the new application process, or if they do not fulfil its demands to the satisfaction of Crown officials, they will suffer prejudice in that they risk the loss of potential or actual landbank properties. It is therefore important that adequate support is provided to ensure that their input is facilitated, received, and acted upon. In particular, if the review exercise has not yet occurred we

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42. Document U22, pp 16–17

are of the view that the Crown should provide financial or technical assistance to claimants, should they wish it, to help them complete the multiple applications demanded.

### 10.5.3 Was the consultation and implementation process adequate?

As we have seen, claimants first learned of the Crown's proposed changes in February 2004, by letter, and had a maximum of about six weeks to respond. Although over 900 letters were sent out, only 15 responses were received – a response rate of 1.7 per cent.<sup>43</sup>

According to Ms Baggott of OTS, people on the mailing list were 'generally counsel and claimants who specifically rang up and said we want to be on your mailing list because we are interested in protection of properties'. Under cross-examination, she said that the list included a 'a lot of the counsel' appearing in the Tauranga inquiry and also 'a number of the named claimants'.<sup>44</sup> She nevertheless acknowledged in her evidence that the mailing list used for the exercise was not up to date (although commented that, as at November 2006, steps were being taken to update it for future reference).<sup>45</sup> She agreed that the response rate was low and admitted that some of the addresses may have been incorrect and letters may thus have gone to the wrong place. She also, however, pointed to other possible reasons for non-response, such as claimant complacency, or preoccupation with other matters.<sup>46</sup> While such reasons cannot be proved or disproved, it does seem to us that, in light of the poor response, some sort of follow-up action or evaluation might have been desirable. Did OTS stop to consider, at the time, why the response was so low? Was any thought given to trying other forms of communication, such as phone calls or hui? Or, if letters were the only viable option, cost-wise, did OTS consider the possibility of sending out a second letter to encourage response? There is no evidence of any such follow-up action. Yet it does seem to us that attempts could have been made to present the information in a more 'user-friendly' fashion. For example, claimants in places such as Tauranga could usefully have had their attention drawn particularly to the proposed policy changes relating to raupatu areas. Ms Baggott herself admitted that communication of the change from 'having to do nothing' to 'actively put[ting] in an application' could have been 'a bit clearer'.<sup>47</sup> She did say, however, that people 'could have contacted their counsel or the Office of Treaty Settlements for clarification', and that 'some people did call OTS'. She did not elaborate on the nature or number of the calls.<sup>48</sup>

We have little information on the 15 respondents who did reply to the February letter, in terms of any who may have had interests in the Tauranga area. We know that the Hauraki Māori Trust Board responded, indicating its opposition to any proposal to take lands out

43. Document T12, app 4, doc 1, pp 1–2; transcript 4.6, p 128

44. Transcript 4.6, p 131

45. Document T12, p 7

46. Transcript 4.6, p 122

47. Ibid, pp 125–126

48. Document U41, p 13; transcript 4.6, p 126



of the landbank, but Ms Baggott was unable to say whether there was anyone else.<sup>49</sup> Other Crown evidence states that '[n]o negative comment' was received from claimants in any raupatu area other than Waikato.<sup>50</sup> A briefing paper for the Cabinet Policy Committee observes that 'in general the majority of the 15 responses received indicated that the proposal appeared reasonable'. It goes on to comment, however, that 'concerns [were] raised by some claimants about the proposed disposal of some properties from the landbank', and that the intention was for OTS to write to these people and explain that once a list of 'undesirable properties' had been drawn up, affected claimants would be notified and their input sought before any disposals occurred.<sup>51</sup> In cross-examination, Ms Baggott confirmed that 'details around the implementation of [the new] policy . . . took into account comments from the claimants themselves', but she did not confirm whether claimants had received individual responses to their submissions.<sup>52</sup>

As a postscript on this phase of the policy change process, we note that details of some aspects of the new process were not finalised until after the February 2004 letter was sent out, and thus, irrespective of the efficacy or otherwise of the initial communication strategy, claimants had no opportunity to comment on them. A particular example of this is the 'tests' to be used in deciding which properties would be included in the review of existing landbank holdings. These do not appear to have been finalised until April 2005, when they were put to the Joint Ministers in a briefing paper.<sup>53</sup>

Although communication in the consultation phase left much to be desired, by the time of the implementation phase there is evidence that lessons may have been learned. Certainly there appears to have been a greater awareness of some of the potential impacts on claimants. In terms of reviewing landbanked properties, for example, Ministers were warned: 'Advertising and seeking submissions from claimant groups on 350 properties will impose a significant burden on claimant groups in these areas.'<sup>54</sup> Officials also appear to have been aware of the need to disseminate information more widely and proactively:

OTS officials will meet with mandated groups within the old CSP [Crown settlement portfolio] and CSLB [claim-specific land bank] areas to advise them of the changes to the landbanking processes, and explain the Regional Landbanking (Protection Mechanism) process to them. OTS will work with TPŌ [Te Puni Kōkiri] to identify those groups who are not mandated within these areas, and will write to them informing them of the changes.<sup>55</sup>

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49. Transcript 4.6, pp 122, 140

50. Document T12, app 4, doc 2, p 8

51. Ibid, p 4

52. Transcript 4.6, p 127

53. Document T12, app 6, pp 2, 4

54. Ibid, p 4

55. Ibid, p 7

That said, we do not have evidence of any of the hui actually occurring. While it is possible that some may indeed have been held, all we have been presented with in evidence is a letter advising that ‘some significant changes to the landbanking process’ were about to be implemented, and detailing what they were.

In terms of communicating information about the new policy, claimant counsel acknowledged that the need for claimants to ‘take active steps if they want to have properties land banked’ was better expressed in OTS’s letter of 29 June 2005 than in the earlier letter of February 2004. However, claimant counsel said it still required an understanding that ‘Crown Settlement Portfolio areas’ effectively meant raupatu areas. In our view, there is also some residual confusion about whether an application for landbanking of properties in such areas is a firm requirement or merely advisable. At one point the letter says that ‘properties in Raupatu Areas will be considered for landbanking *whether or not any application is received for landbanking*’ [our emphasis], but that it is ‘still important’ to make an application as the additional information will assist in the assessment. However, a paragraph or so later the same letter states:

As a result of the review, all surplus Crown land will now be advertised through the Protection Mechanism process. This means that claimants *must* advise OTS why they would like the property to be landbanked, *in order for the property to be considered for landbanking*. [Emphasis added.]<sup>56</sup>

We note that at one point claimant counsel’s closing submissions also seem to interpret the policy change as meaning that claimants must advise OTS of their interest and (only) then will the property be considered.<sup>57</sup> We are not convinced that this is the case, but the Crown needs to make the situation clearer. In our opinion, even OTS’s current advice on the protection mechanism process could be better worded. For instance, a flowchart in an information booklet currently available via OTS’s website describes one step of the process as being that ‘Applications are received and are eligible or are in a Raupatu Area.’<sup>58</sup> The phrasing of the sentence is problematic. It appears to propose two scenarios: either that applications are received and are eligible or that applications are received and ‘are in’ (or rather, we presume, relate to land in) a raupatu area. Both scenarios, though, appear to imply that consideration *is dependent on an application first having been received*.

#### 10.5.4 Treaty analysis and findings

In light of the above, there seems justification to the Ngā Pōtiki claim that there was a failure on the part of OTS to engage in ‘full and meaningful consultation’ with Tauranga

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<sup>56</sup>. Document R31, p 7

<sup>57</sup>. Document U22, p 9

<sup>58</sup>. Document T12, app 1, doc 1, p 3

Moana Māori prior to the introduction of the new policy. The ‘consultation’ was largely confined to a single letter in which information was not particularly well conveyed, and the low response rate did not seem to trigger any concern from either officials or Ministers. Information at the implementation stage, although better, still lacked clarity on some points – and indeed that situation still pertains. Apart from any Treaty considerations, this is disappointing given that Māori are the intended beneficiaries of the landbanking system and one might have hoped that they would have been given better information and that their views would be more actively canvassed. In Treaty terms, we noted in chapter 1 of this report the Court of Appeal’s view that the Crown, in exercising kawanatanga and sovereignty, has a duty to make informed decisions.<sup>59</sup> Although the court went on to say that it did not consider consultation to be an absolute duty in all situations, the central North Island Tribunal has since expressed the view that the Crown has a duty to consult Māori at least on matters of importance to them.<sup>60</sup> It then went on to add: ‘The test of what consultation is reasonable in the prevailing circumstances depends on the nature of the resource or taonga, and the likely effects of the policy, action, or legislation.’

We have no doubt of the importance of land to most Tauranga Māori, in light of the limited amount now left to them in Māori title. Furthermore, since the introduction of the policy changes, there is a reduced level of protection and there is potential for prejudice if tangata whenua either do not undertake the new application process or fail to fulfil its demands to the satisfaction of Crown officials. We therefore find that the degree of consultation was insufficient in the circumstances and fails to comply with the Crown’s Treaty obligations. We also make an overall finding that Ngā Pōtiki’s claim as outlined at section 10.3 above is well founded, and that there is potential for prejudice not only to Ngā Pōtiki, but to all Tauranga Māori.

#### 10.6 MAIN CONCLUSIONS AND FINDINGS IN THIS CHAPTER

Our main conclusions and findings in this chapter are as follows:

- ▶ We find there is no Treaty breach in the Crown disposing of surplus land and property that is not required for the settlement of Treaty claims.
- ▶ The Crown’s consultation process, prior to introducing the revised policy, was inadequate. We acknowledge that the Crown’s partnership duty to consult is not absolute in all circumstances, but we uphold the view that there should be full and meaningful consultation on all matters of importance to Māori. There is no doubt about the importance of land to Tauranga Māori: the Tauranga raupatu district is more highly

59. *New Zealand Māori Council v Attorney-General*, p 665 per Cooke P, p 693 per Somers J

60. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 4, pp 1236–1237

urbanised than any other raupatu district, and Tauranga Māori have little chance of recouping much of what they lost. We accordingly find the Crown in breach of its Treaty duty in this matter.

- ▶ The Crown's revised policy on landbanking incorporates a number of changes which, taken together, result in less protection of claimants' interests for more claimant effort. In particular, there is potential for prejudice if tangata whenua either do not undertake the new application process or fail to fulfil its demands to the satisfaction of Crown officials.
- ▶ Further, the Crown's requirement for claimants to review the Tauranga properties already held in the landbank represents a substantial burden of work, with no Crown assistance (other than information) being offered to help them complete the task. We find this to be a breach of the Crown's duty of active protection.
- ▶ Overall, we find that Wai 1328 is well founded and that there is the potential for prejudice not only to Ngā Pōtiki but to all Tauranga Māori.



## CHAPTER 11

### HE KŌRERO WHAKAMUTUNGA

#### 11.1 GENERAL CONCLUSIONS

This report has looked at issues arising in the 120 years between 1886 and 2006. Much of it therefore focuses on the twentieth century, which spans the bulk of that timeframe and which was an era that brought significant change in the Tauranga region, not least because of the impact of urbanisation. Nevertheless, it is important not to lose sight of the closing years of the nineteenth century. In some respects the changes wrought in that period were even greater, because they involved Māori coming to terms with a sudden and massive shift in population balance and the accompanying encroachment of Pākehā culture on their way of life. Further, the land loss of Tauranga Māori in the late nineteenth century was considerable. Added to the effects of the raupatu, that loss forms a critical backdrop to understanding the impact of Crown policies and practices in the century or so that followed.

##### 11.1.1 The situation at 1886

At the end of the stage 1 inquiry, which considered the period up to 1886, the Tribunal concluded that Tauranga Māori had done nothing to justify the Crown confiscating land from them, and that the Crown had arbitrarily chosen what land it would take, without consultation with those Māori affected. Moreover, it found, the Crown's purchase of the large tract of valuable land comprised within the Te Puna–Katikati block was carried out without the free and willing consent of most of the owners affected. The ensuing process of allocating reserves in both the confiscated block and the Te Puna–Katikati block left much to be desired. In the Tribunal's view, hapū of Ngāti Ranginui were particularly disadvantaged, losing a higher proportion of their customary land than did Ngāi Te Rangi. On top of that, all land that was given back to Tauranga Māori, across the district, was returned under an individualised form of tenure, without the recipients having any choice in the matter, and a significant proportion of that land was then alienated prior to 1886. The Tribunal thus concluded that the Crown had 'failed to ensure that the hapu of Tauranga were left with a sufficient endowment of quality land to provide for their needs.' Further, said the Tribunal, to compound the disadvantage to Tauranga Māori, the Crown had failed to ensure they had

a sufficiency of skills and capital with which to develop lands left to them.<sup>1</sup> We would also note here that, in depriving Tauranga Māori of some of their potentially most economically productive lands (including the area that was later to become the Athenree Forest), the Crown had inflicted a significant opportunity cost on Tauranga iwi and hapū in terms of their future land development options.

#### 11.1.2 Further land loss

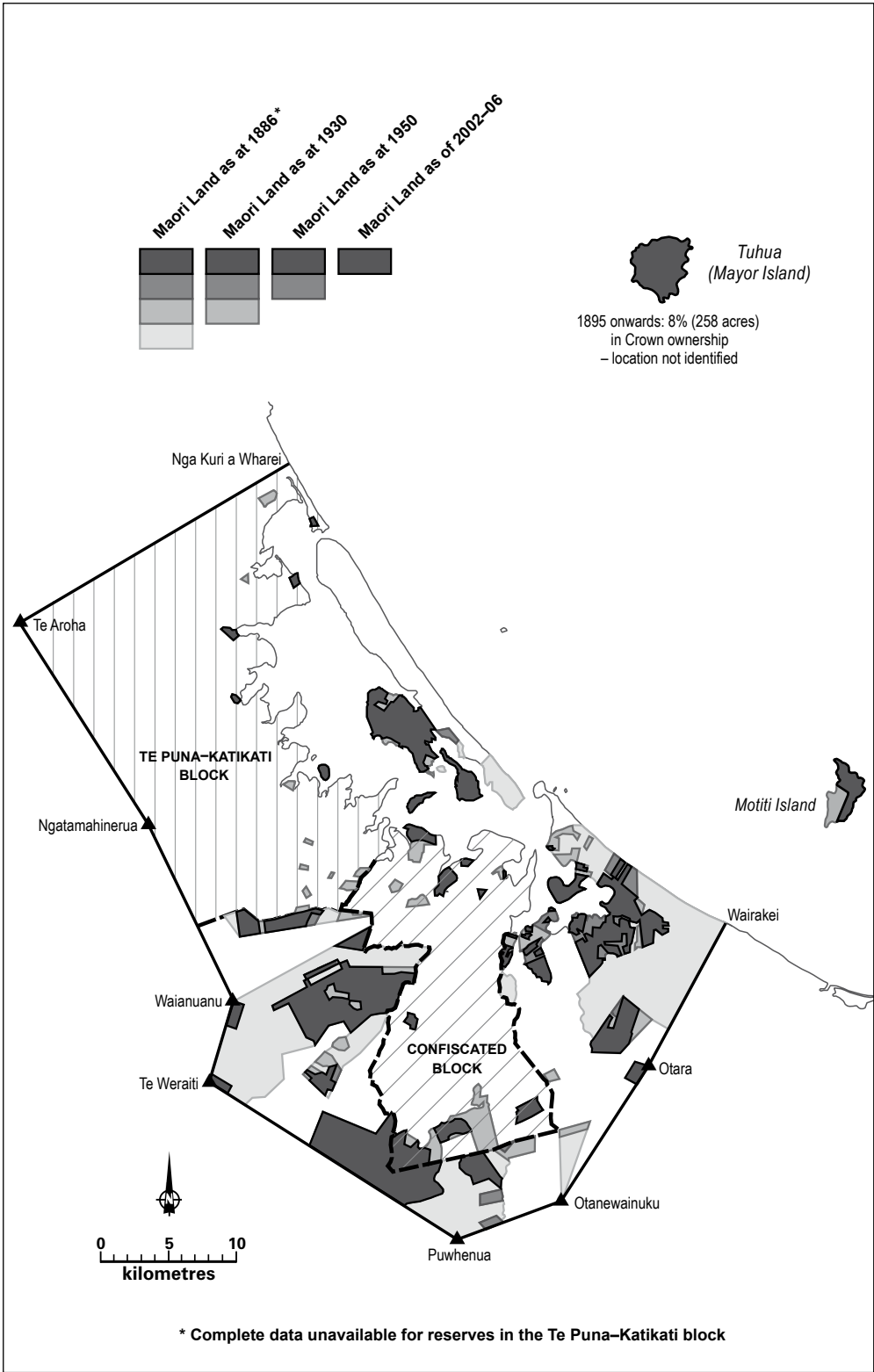
In our present report, chapter 2 has shown how the closing years of the century then saw the loss of yet more large tracts of land – some 34,368 acres (13,908 ha) in the 1890s alone, with almost three-quarters of that being purchased by the Crown. In some instances, the Crown, by its own admission, capitalised on situations of hardship where Māori were forced into selling as a result of crop failure and lack of food (see sec 2.3.5). By the turn of the nineteenth century an already insufficient area had been further diminished, to a significant degree – a situation in which the Crown was directly involved. Further, as we saw in chapter 9, despite the Crown making provision for South Island ‘landless Natives’, it gave no assistance to Tauranga hapū such as Ngāi Tamarāwaho and Ngāti Hangarau who found themselves similarly impoverished.

Māori land loss in the Tauranga area would never again reach the heights of the late nineteenth century, but in the twentieth century other pressures arose. Māori Land Court judges (and later the Māori Trustee) were tasked with identifying ‘idle’ Māori land suitable for settlement by Pākehā (see secs 2.5.1, 2.11.1). Public works takings nibbled away at remaining land, resulting in a total loss of around 4960 acres (2008 ha) between 1886 and 2006 (see ch 4) – and we note that, in a number of cases, more land appears to have been taken than was strictly necessary. Alongside that, concern about actual and potential Māori rates debt caused both local and central government to press for development and subdivision. For a range of reasons, that process then led to more land being alienated (see chs 5, 6).

Often it was a combination of factors that resulted in the loss. For instance, when Whareroa Māori faced pressures on their land in the mid-twentieth century, they decided that their best hope was to rationalise their landholding around the eastern end of the harbour and to focus their attention principally on Matapihi instead. The plan was to subdivide their Whareroa land and retain some sections there, but to use the proceeds from selling the remainder to pay off rates debt and improve conditions at Matapihi. But then the port and airport developments resulted in much of their Whareroa land being lost to public works, with only limited compensation – and it is relevant to note here that the Crown in fact took far more land than it needed and sold off the excess for considerable profit. For the Māori of Whareroa, the situation on Matapihi has not been without its difficulties, either.

1. Waitangi Tribunal, *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* (Wellington: Legislation Direct, 2004), pp 400–401





Map 11.1: Alienation sequence

Strategically located between Tauranga and Mount Maunganui, the area has been eyed by central and local government for a range of development and infrastructure projects. Although plans for a technical institute, a hospital, and an oil-fired power station did not eventuate, it has been estimated that in total they lost almost 10 per cent of the peninsula to public works of various kinds. In effect, it soon became a ‘service corridor’ between the two urban centres, and Māori have had to fight to minimise the impact of road, rail, electricity, water, and sewerage networks over their land. Of particular note in this context is that for many years they received no direct benefit from some of these services, because their homes, being on land zoned ‘rural’, were not reticulated to the networks in question. Further details on land issues at Whareroa and Matapihi are to be found at sections 3.6.2, 4.3.2, 5.7.2, and 6.3 of this report.

Similarly, Māori in Maungatapu and Hairini have been affected by a range of local and central government measures. In the first half of the twentieth century, legislative provisions aimed at guarding against *individual* landlessness were not always well suited to protecting a collective Ngāti Hē and Ngāi Te Ahi landbase in the area (see secs 2.5, 2.6). That said, the 30 or so hectares (around 75 acres) lost from various Maungatapu and Hairini blocks prior to 1950 pale into insignificance against the losses in the second half of the twentieth century – and particularly in the 1960s and 1970s. Construction of a major state highway along the length of the peninsula, linking Tauranga to Mount Maunganui by way of Matapihi, coupled with pressures on Māori to subdivide and sell in order to meet actual and potential rates debt, saw most of the rest of Maungatapu and Hairini pass out of Māori hands by the 1980s.<sup>2</sup>

### 11.1.3 Land development constraints

Meanwhile, throughout the period covered by our stage 2 report, attempts by Tauranga Māori to farm or otherwise develop their dwindling landbase often suffered from a range of hurdles and handicaps (see ch 3). During the economic downturn of the 1880s and 1890s, tangata whenua saw a one-third reduction in their total cultivated land in the space of about 10 years, and stock numbers also fell significantly. It was not for want of effort: Robert Stout, in his subsequent investigation of Māori land around New Zealand, reported Tauranga Māori as being ‘exceedingly industrious’. When he and Apirana Ngata reported to Parliament in 1908, they advised that Māori in the Tauranga area needed to retain the great majority of their remaining lands, noting that they estimated European landholding in Tauranga as ‘at least three times as great [per head] as that left to the Maoris’. Stout and Ngata also recommended that the Government provide agricultural training for Māori,

2. Michael Belgrave, Grant Young, Adam Heinz, and David Belgrave, ‘Tauranga Maori Land Alienation: A Quantitative Overview, 1886–2006’ (commissioned research report, Wellington: Waitangi Tribunal, 2006) (doc T16(a)), pp 40–43, 59–67

such as cadetships at the Government's recently established experimental fruit farm (see sec 3.3). But, despite the disadvantage under which local Māori were operating, Crown assistance to them was minimal compared with that given to European farmers: a proactive programme of loans at low interest to help finance farm development, for example, was aimed entirely at Pākehā (again, see sec 3.3). Nor could Māori turn to the private sector, because the multiple title in which their land was held rendered it almost impossible to obtain credit from private institutions. And there is no evidence that any agricultural education was provided to adult Tauranga Māori in these early years: all that was offered, it seems, was some basic agricultural instruction to young Māori boys attending native schools such as the one at Maungatapu (see sec 9.4.2). As to other assistance, while it is true that, from 1906, Māori incorporations could be set up which did have some access to State funding (tightly controlled through the Public Trustee), we are not aware of any having been established in the Tauranga region at that time. In this context, we note the central North Island Tribunal's conclusion that incorporations were expensive to establish and operate, had only limited access to lending finance, and required owners to relinquish direct involvement in their land.<sup>3</sup>

Matters began to improve somewhat from the late 1920s with the introduction of a national programme of Māori land development schemes. Four such schemes were established in the Tauranga area, and almost immediately became the primary vehicle for channelling unemployment relief funds to Māori during the Depression. In terms of farming, two of the schemes (Mangatawa and Poripori) were clearly successful examples of land development. In all cases, however, control of the land was taken out of the hands of Māori, and it was difficult for them to feel any sense of ownership or even participation. Certainly some tangata whenua were employed as day labourers, but few had any role as managers, few were given training in the new farming techniques necessary for success, and only later did the Crown promote the formation of owners' advisory committees. Further, even with the two most successful schemes, the financial benefit took time to filter through to owners. That said, the schemes represent a genuine effort by the Crown to try to find some way of overcoming the disadvantage created by the title system it had introduced, in order to enable Māori land to become more productive.

In the post-war period, even greater pressure began to be exerted for Māori land to be used productively, but a 'small-farm scheme' promoted by the Government in the early 1950s, and aimed at assisting Tauranga Māori to develop smallholdings for market gardening and horticulture, did not live up to its early promise. In part this was because it clashed with other local and central government plans to improve infrastructure – projects which all required land – and in part because of encroaching urbanisation. A 1961 Ministry of Works survey of Māori land also identified some familiar problems: multiple title,

3. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 3, pp 979–980, 984

insufficient capital, and lack of training (see sec 3.6). In 1971, a report produced by the Bay of Plenty Agricultural Development Committee estimated that, by then, Māori farmers had fallen behind by about 10 to 20 years in their farming practices (see sec 3.6.2). Meanwhile, attempts at consolidating interests to form more workable areas of land, for example at Matapihi and on Matakana Island, had not met with success. (In the case of Matapihi, the proposal was opposed by the county council who saw the area as more suited to urban development – again see section 3.6.2.) The Department of Māori Affairs seems thereafter to have abandoned attempts at consolidation in the Tauranga area.

In the 1960s and 1970s, as urbanisation on the one hand and a booming kiwifruit industry on the other pushed land valuations higher and higher, central and local government tried to solve the likelihood of increasing rates debt by encouraging many Māori, especially on the urban fringes, to subdivide their land and sell (see secs 5.3.4 and 5.7.2). It was a period when moving to town and working on the wharf was seen as a better option for Māori than remaining on the land and trying to overcome the cumulative disadvantage – and some Māori certainly shared this view. Others, such as the Tauranga Māori Executive, tried to battle on, seeking assistance from the Department of Māori Affairs to undertake a ‘stock-take’ of what land remained in Māori ownership. Their request was declined on the grounds of cost. A later request to the department, to assist with the mechanics and cost of incorporating land in the Kaimai area, was also turned down (see sec 3.6.2).

The picture with respect to land trusts, however, is more encouraging. With the introduction of section 438 trusts under the Māori Affairs Act 1953 and then, in 1965, reduced security requirements for section 460 lending, the use of trusts to assist landholding and development increased. While there were still occasional setbacks and difficulties, a number of trusts set up in the late 1960s and the 1970s have survived and done very well. Some of them, for instance, established successful horticulture ventures and, in the process, have offered a useful opportunity for Māori to learn new skills (including in management). They have also generated funding for community purposes such as education scholarships and marae grants. That said, we note that in many cases the problem of multiple ownership merely shifted from the land title deed to the trust shareholder list, and it continues to cause administrative headaches. We also note that, since the 1980s, the Department of Māori Affairs (now Te Puni Kōkiri) has lost the power to provide development finance, and little new commercial development of Māori land has been possible in the Tauranga area. Of particular concern, in our view, are small remnants of land that, on their own, do not lend themselves well to large-scale agricultural or commercial development but which may be of significant importance, as the last vestiges of traditional land holdings, to the Tauranga whānau and hapū that own them. One such example drawn to our attention was a small part of Pāpāmoa 4B, under threat from adjacent developers (see sec 2.9.4). At the time of our hearings, the Ngāti Kāhu owners were trying valiantly to find some viable way to retain it, but faced with high rates, a lack of access to finance, and the seeming impossibility of

finding a joint venture partner willing for them to retain ownership, we have to say that their chances of success appeared slim.

#### 11.1.4 Access to natural resources

Also affected by Crown policy and practice has been iwi and hapū interaction with the natural environment of Tauranga Moana (see ch 7). We have noted how, traditionally, each hapū in the district tended to have customary use rights in both inland and coastal areas so that they could access (and care for) a range of different resources.

However, such usage patterns were disrupted by the confiscation which deprived many Tauranga Māori of access to at least some of their traditional areas. Their reduced land-holding also pushed them towards a greater reliance on marine and river resources. But the Crown's encouragement of European settlement and European-style land development then created competition for the more easily farmable coastal lands, and for coastal resources in general. One result was that some Tauranga Māori alienated inland blocks to generate cash to help them hold on to coastal interests. However, even where this tactic was successful, they could no longer take for granted their customary access to marine resources: since the Crown did not recognise Māori ownership of the foreshore and seabed, hapū with coastal interests were completely powerless to prevent others encroaching on their traditional food-gathering places in, for example, saltwater marshes, sand flats, or fisheries within the harbour. And although various statutory provisions have existed since the beginning of the twentieth century for the creation of customary fishing areas, Māori efforts to establish such zones have tended, for various reasons, to be blocked by either central or local government agencies. Under the current legislation the tally of fishing reserves for Tauranga Māori stands at one mātaitai reserve, and no taiāpure. Nor has the legislation controlling commercial and recreational fishing been entirely successful at maintaining fish stocks in the harbour. As to rivers, customary title there was deemed extinguished by the raupatu confiscation, so the tangata whenua could only access freshwater resources if they managed to secure legal title to riparian land.

#### 11.1.5 Environmental impacts

Reduced access to resources has not been the only problem for Tauranga Māori: they have also seen the degradation of some ecosystems (again, see ch 7). In line with official thinking of the time, wetlands and tidal areas were persistently seen by early central and local government as 'swamps' and 'mudflats' that needed 'improving' in order to increase agricultural production, and those attitudes changed only slowly over the decades. We note that Environment Bay of Plenty estimates that some 1000 hectares of wetland have been drained and reclaimed in the Tauranga Harbour area alone (see sec 7.5.1). Indigenous forests have

also been felled, notably in the Kaimai area and in the hills between Katikati and Waihi, and often replaced by exotic forests – one such example being the Athenree Forest. Such activity was encouraged by the Crown, but has affected biodiversity and also the availability of some natural resources formerly used by Māori on a regular basis for food or medicine. In some areas, too, the harbour board for several decades tacitly allowed the dumping of mill waste on the foreshore. As to the port, its development has been a major plank in central and local government plans for the region, but associated works such as dredging and reclamation have often had a negative effect on marine ecology and have destroyed seafood beds. Indeed, we understand that even parts of the mātaiai reserve, mentioned above, may be currently under threat from proposed dredging to improve port access. Further along the coast, on the eastern edge of our inquiry district, reclamation and urban development have resulted in the loss of the Wairākei Stream. In its place is a stormwater drain.

Since the early twentieth century, pollution has also increasingly affected marine and freshwater environments. Agricultural runoff, industrial discharges, and rubbish-tip seepage have affected rivers and streams and ultimately found their way to the sea, while raw sewage was permitted to discharge into the harbour. Such problems were clearly evident in Tauranga Moana throughout much of the twentieth century, and the legislation passed has been insufficient to control them. Meanwhile, air quality has been affected by a range of pollutants including noise from the airport, odours from the fertiliser works, and chemicals from crop spraying.

At the same time, however, it must be noted that both the port and the timber industry have provided jobs for Tauranga Māori, and exotic forestry has enabled a financial return on some land (including Māori land) less suited to farming.

#### 11.1.6 Loss of cultural heritage

The coastal Bay of Plenty, including the Tauranga area, is significant for Māori as one of the first parts of New Zealand to be settled by their ancestors. As such, as we discussed in chapter 8, the landscape of Tauranga Moana is rich with sites that are of cultural, spiritual, and historical importance to Tauranga Māori. Yet, until the 1950s, the Crown made no legislative provision to help protect places that Māori regarded as culturally significant. Even since that time, the emphasis has often been on ‘rescue archaeology’, to help record archaeological information about a site before its modification or destruction, rather than on preserving places intact (some of which, such as special springs or hills, may have no archaeological remains in any case). Further, local bodies have all too often failed to accord any great importance to the preservation of Māori heritage. Sometimes it has been possible to achieve protection of a particular site, but there is rarely any protection for the wider area surrounding the site, which may also be of cultural significance, or for sites without archaeological remains. The fringes of the harbour and the Bay of Plenty coastline are a

particular worry in this respect, as can be seen from the case studies in chapter 8. The apparent lack of any great commitment on the part of central and local government to solve these problems concerns Tauranga Māori greatly because, given the amount of land alienation that has occurred in the district, much of their cultural heritage lies on land that now belongs to others. Unable in most cases to exercise rangatiratanga or kaitiakitanga over sites, areas, and taonga of importance to them, Māori of Tauranga Moana have had to sit by and watch their heritage dwindling away.

#### 11.1.7 The socioeconomic position of Tauranga Māori

Many factors have affected the socioeconomic position of Tauranga Māori, not all of them the result of Crown action or inaction. As noted in the stage 1 report, contact with Europeans, and the new infectious diseases they carried with them, brought a general decline in the New Zealand Māori population during the nineteenth century, which appears to have been echoed in the Tauranga district.<sup>4</sup> Although immunity to diseases gradually increased, and population numbers began to pick up again not long before the beginning of the twentieth century, poor standards of health persisted. While it must be acknowledged that many Māori remained wary of European medical services (and more particularly hospitals) in these early years, official attitudes towards Māori were often not helpful either: the local Tauranga charitable aid board was frequently reluctant to assist ailing Māori, and central government support for Māori health care was patchy. There was, for example, little Government funding for medical officers in the area or Government assistance for hospital care for Tauranga Māori. On the other hand, the native health nurses and district nurses made a valuable contribution. With generally better health-care provision from around the middle of the century, the situation improved: tuberculosis rates, for example, dropped considerably in the space of about 10 years (see sec 9.6.1). In particular, since the 1970s there have been encouraging signs of more Māori-oriented health care services. Even now, however, Tauranga Māori have worse health statistics than their Pākehā counterparts.

Extensive land loss, particularly through raupatu and in the late nineteenth century, almost certainly had a significant impact, and not least in terms of the dislocation caused. For example, when Ngāi Tamarāwaho had to move from their confiscated lands, many went to a remnant allocated to them at Hūria (Judea). The area was not large, and the soil was of poor quality. The result was a reliance on gumdigging and whatever work could be got around town (see sec 9.3.3). Low incomes meant poor living conditions. Fifty or so years later, a Ngāi Tamarāwaho community of about 275 people was divided between Hūria and nearby Te Reti and Matahoroa (see sec 9.4.3), and still living in poor conditions. Housing at Hūria, in particular, was dilapidated and overcrowded, and the hapū was again faced with

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4. Waitangi Tribunal, *Te Raupatu o Tauranga Moana*, p 56



some of their number having to move. On this occasion, encouraged by the Department of Māori Affairs and by the provision of some loan assistance, the best option for many was to try to purchase a section in one of the new residential suburbs of Ōtūmoetai and Greerton. Over the ensuing years, many other rural Māori, too, were encouraged and assisted to move to the city.

Urban living was a new experience for most Tauranga Māori at that time. By 1956, there were still only 195 Māori living within the boundaries of Tauranga borough (again see section 9.3.3). From mid-century onwards, however, many Māori became urban dwellers. It was not necessarily by choice. Those living in rural settlements on the outskirts of Tauranga and Mount Maunganui, for instance, found the town arriving uninvited on their doorsteps, and it was not long before urban boundaries completely engulfed them. The accompanying pressures took their toll, including public works takings for infrastructure, environmental pollution, loss of customary food sources, and skyrocketing valuations (with the increased risk of rates arrears). For many, the result was a complete transformation of their lifestyle in the space of a generation. Not everyone saw the change as negative, of course, and many Māori appreciated the new opportunities that urbanisation brought. The problem was how well they were equipped to seize them.

For most of the period covered by this report, the education received by Tauranga Māori did not take large numbers of them into higher-paid employment. There was a concerted attempt in native schools to give Māori children fluency in English (often to the detriment of te reo Māori), but a strong emphasis on teaching practical skills rather than academic subjects. Meanwhile, at Education Board schools, only a small proportion of Māori children managed to reach the upper standards, or succeed there. In all, few Māori children progressed to secondary level via either route. That said, the dedicated work of many individual teachers must not go without comment and it is likely that, assisted by their efforts, some young Tauranga Māori did manage to gain admission to boarding schools such as Te Aute, Wesley College, and (for the girls) Hukarere, where there was a greater emphasis on academic achievement and leadership. As expectations changed (on both sides), more Māori children stayed on for secondary education – a situation fostered by Government raising the school-leaving age for all New Zealand children (initially to 15, in 1944, and then higher still in later years). Some Māori students also continued to tertiary level. Even today, however, a significant disparity exists between Tauranga Māori and the general Tauranga population in terms of the percentage achieving higher qualifications.

There is also a disparity in the area of employment, with Māori being over-represented in lower-paid work such as labouring, plant and machinery operating, and assembly work, and under-represented in professional occupations. In terms of unemployment, we note the disproportionately large impact on Māori of the 1989 port restructuring exercise, when a high number of Māori staff were among those laid off. We also note that, in 1991, Māori made up 25 per cent of the registered unemployed in the Western Bay of Plenty and Tauranga

districts, despite constituting only 14 per cent of the working-age population. Not surprisingly, these outcomes impact on overall socioeconomic status, with a disproportionately high number of Māori living in the most socially and economically deprived areas of the inquiry district (see sec 9.2).

#### **11.1.8 Planning constraints**

Town planning legislation has existed in New Zealand since the 1920s, but town and country planning policies really only began to gain traction in the 1970s. As we saw in chapter 5, Tauranga Māori have in some respects fared better than Māori elsewhere in that, from the mid-1970s, the Tauranga County Council saw fit to establish marae community zones, so that community facilities such as sports grounds, and limited housing, could be built near marae – initially only in rural areas but later for urban marae as well. This initiative appears to have been in advance of any central government move to promote marae community development. Nevertheless, district planning overall has often failed to prioritise Māori concerns and aspirations, and in the past consultation has been unsatisfactory. Of recent years the situation has improved but, as we noted in relation to cultural heritage, Māori needs and wishes still tend to receive less consideration than those of the general population. In part, this reflects the primacy given to urbanisation and economic development: local authorities often come under considerable pressure from developers to make land available for residential or commercial purposes, and infrastructure needs have to be catered for if economic growth is to be fostered. This emphasis on urbanisation and economic growth is generally supported by central government in the interests of the national economy (including job creation). However, it can relegate to second place local Māori concerns about, for instance, the preservation of natural resources and cultural heritage, and militate against hapū aspirations for maintaining and promoting a community lifestyle. That said, Māori are not unmindful of the better amenities that tend to come with urbanisation. Māori from Bethlehem and Matapihi, for example, are among those who have recognised the tension between trying to retain a rural zoning and community lifestyle, while making provision for a reasonable level of community services and facilities for their hapū.

#### **11.1.9 Political representation issues**

Among the problems for Māori over the years has been a lack of representation on various bodies and at various levels. As we saw in chapter 5, Māori formed the larger part of the New Zealand population until around 1858, but had little voice in terms of formal representation in government. Relative population numbers changed rapidly. By 1871, there were around seven times more Pākehā in New Zealand than Māori, yet Pākehā held 19 times as many seats in the House of Representatives. And while four specifically Māori seats had

been created in 1868, no person who was more than half Māori could stand for election in a general seat before 1967.

At local government level the situation was, for decades, far worse. There were occasional examples of Māori being elected to general seats on local bodies, but these were a rare occurrence: in our inquiry district we have seen reference to only two instances. Not until 1977 did the Crown make any legislative provision for specifically Māori representation on local bodies, and then only to regional planning committees, not the councils themselves. By the late 1990s there were still only 39 Māori elected members in local government throughout New Zealand, being a mere 3.5 per cent of the total 1123 elected members on 86 different councils (see sec 5.10.2). Finally, in 2001, the Bay of Plenty District Council (later Environment Bay of Plenty) – embracing a region where 28 per cent of electors identified as Māori – took the initiative of preparing a local and private Bill seeking approval for Māori constituencies. Parliament passed the Bay of Plenty (Māori Constituency Empowering) Act in October 2001, making provision for Māori wards as of right. Also in 2001, a Local Electoral Act made provision for other local authorities to have Māori wards and Māori electoral rolls if they so wished (see ch 6). So far, the Tauranga City Council and the Western Bay of Plenty District Council have not taken up this option.

Since 2002, the Crown, through its legislation, has encouraged councils to facilitate Māori participation in local government consultation processes and, in our inquiry district, claimants have been appreciative of the efforts of Tauranga City Council and Environment Bay of Plenty in this regard. That said, participation in local government processes often constitutes a significant drain on the resources of hapū and iwi in that much of it takes place on a voluntary and unpaid basis. Some Tauranga Māori are also concerned that the practical outcomes – particularly in terms of protection of their cultural heritage, and of resources and environments important to them – still leave something to be desired (see chs 7, 8).

#### 11.1.10 The situation in 2006

By the time of our stage 2 hearings, Tauranga Māori had lost over 75 per cent of the land returned and reserved after the raupatu, and more than 50 per cent of the amount recommended for their retention by Stout and Ngata in 1908. Land still in Māori title currently constitutes around 11 per cent of land within the inquiry district – although we acknowledge that many Tauranga Māori also hold land in general title.

Under particular pressure are tribal lands that are threatened by urbanisation. Here we again note the concerns of Matapihi Māori about how long they can continue to hold on to their land on the Matapihi Peninsula. Many of them are part of the same wider tribal group, Ngāi Te Rangi, who earlier lost almost all their land at Whareroa – at one time the largest Māori settlement in the whole inquiry district, chosen, as we saw in chapter 2, as the site of

the important 1885 meeting that Tauranga Māori had with Ballance. At Whareroa, Ngāi Te Rangi now have little more than a marae, some kaumātua housing, and an urupā, and these are completely surrounded by the port, airport, and commercial and industrial sites.

As to other kin groups, many of Ngāi Tamarāwaho, it would seem, are now living in suburbs like Greerton and Otumoetai rather than near their marae at Hūria (still less in their wider pre-raupatu rohe). Meanwhile, many of Ngāti Hē have, through the process of subdivision, lost their land interests at Maungatapu and had to move elsewhere. The same is true of a number of Tauwhao Te Ngare who, deprived of their legal rights in land on Rangiwaea Island through the Crown's 'uneconomic interests' provisions, now live in places like Bowentown and Katikati or even further afield. And at Pāpāmoa, district planning provisions, heritage legislation, and Māori land laws have proved insufficient to protect Māori land there from developers. The result is that along that stretch of coastline, most sites of significance to iwi and hapū – for example to Ngā Pōtiki and their hapū Ngāti Kāhu – are now being irremediably damaged or destroyed by the unrelenting advance of coastal subdivisions.

These are but snapshots, illustrative of the kind of situations faced by Tauranga iwi and hapū today. More broadly, we have noted that health, education, and employment statistics are still worse for Māori than for the general Tauranga population, and that Māori are proportionally over-represented in the most socially and economically deprived areas of the inquiry district.

In short, though we have had to break up our discussion of issues into a series of chapters looking at specific topics – and though clearly not all negative outcomes should be attributed solely and directly to Crown actions or omissions – the cumulative and interlinked effects of different Government processes and legislative provisions still add up, in our view, to a considerable degree of prejudice.

#### **11.1.11 The Impact of the Crown's landbanking policy**

One step towards remedying that prejudice would be to return as much land as possible to Tauranga Māori. However, since 2005, the Crown has been implementing a policy which has resulted in less protection of Tauranga claimants' interests for more claimant effort. Prior to the change of policy, all Crown lands and properties located in raupatu areas and deemed surplus to Crown requirements were automatically landbanked, for potential use in Treaty settlements. Under the new policy, such land and property is only *considered* for landbanking, and claimants are strongly advised to submit supporting applications. Further, claimants are required to participate in a review of all already-landbanked properties, with a view to some being sold off (see ch 10).

**11.2 FINDINGS ON TREATY BREACH**

Having considered all the evidence on these various issues, we made a number of findings relating to Treaty breach.<sup>5</sup> These are given at the end of the various chapters, but here we draw them all together before going on to make our recommendations.

**11.2.1 Land alienation**

In chapter 2, our analysis led us to conclude that the individualisation of land tenure, freed of communal controls, meant that Tauranga iwi and hapū were not able to exercise collective tino rangatiratanga over their remaining land. This was in breach of article 2 of the Treaty. In relation to the extensive land alienation that took place in the Tauranga area in the late nineteenth century, we found that the Crown breached the principle of active protection. Its overriding concern was to open up land for settlement, to the detriment of Māori interests and of their tino rangatiratanga over their lands and resources. In this context, we particularly note the lack of Crown assistance to hapū like Ngāi Tamarāwaho and Ngāti Hangarau who found themselves with little or no land. The inadequate efforts of the Crown to investigate grievances, even when promises to do so were made by senior Ministers, fell short of what was required and breached the principle of good faith.

In the early twentieth century, the 1909 Native Land Act's provisions to permit the validation of documents such as court orders and confirmations of alienation, even where it could be shown there had been irregularities, failed to observe the basic requirements of good governance. They also breached the Crown's Treaty obligation to act reasonably and in good faith. Later, legislative provisions that placed Māori Land Court judges, and the Māori Trustee, in a position where there was potential for a conflict of interest, similarly failed to observe the basic requirements of good governance and breached the Crown's Treaty obligation to act reasonably and in good faith (see secs 2.5.1, 2.11.1). Furthermore, measures which allowed alienation restrictions to be removed at the request of a minority of owners breached the duty of active protection.

In keeping with the Crown's duty of active protection and the Māori Treaty right of development, the Crown ought to have ensured that Tauranga iwi and hapū retained a sufficient land and resource base for their foreseeable needs. A number of different Government-sponsored commissions repeatedly found that Māori needed to retain land and, irrespective of any Treaty argument, it is reasonable to expect that the Crown should heed the findings of its own commissions of inquiry. Instead, land loss continued to occur.

In terms of policy and legislation later in the twentieth century, we welcome the Crown's concession that the compulsory acquisition of 'uneconomic' shares by the Māori Trustee breached the Treaty and its principles.

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5. The various Treaty principles are set out and discussed at a broad level in chapter 1.

Overall, the principle of redress demands that the Crown provide ample compensation for the above-mentioned Treaty breaches.

#### **11.2.2 Land development**

The Crown has the ability to foster land development through legislation and policy and, at a practical level, through the provision of finance and training. The terms and principles of the Treaty oblige the Crown to provide Tauranga Māori with assistance that is at least equal to that provided to the general community. Furthermore, where the Crown has created impediments to Māori land development, we are of the view that such assistance may need to be greater than that provided to the general community.

The Crown's land development schemes between 1929 and 1975 were a commendable if belated effort to enable some Tauranga Māori to develop their land. However, these efforts did not, in the main, succeed in overcoming the competitive disadvantages faced by Māori land in multiple ownership. We also note that the schemes often excluded the owners from any meaningful involvement in managing their lands. Further, in the case of the Kaitimako and Ngāpeke schemes, the owners saw very little financial return – not only for the duration of the schemes but, because of the long-term leases put in place, for many years afterwards. These two schemes were carried out on the last substantial landholdings of the respective owners.

Since 1975, the Crown's responses to problems of Māori land development have focused on encouraging the establishment of trusts and incorporations, to facilitate access to private finance. Other than a brief period when loans were provided by the Department of Māori Affairs, the Crown has provided only limited public finance. At the same time, it is clear that difficulties in accessing private finance persist, especially for 'newer players' who as yet have no track record of credit-worthiness they can point to. If Tauranga Māori do not gain better access to finance, they are in danger of losing more land. To avoid breaching the principles of active protection, mutual benefit, and equity, the Crown needs to find some way of assisting Tauranga Māori to realise their aspirations for holding on to their remaining land and developing it.

#### **11.2.3 Public works**

The earliest public works legislation was introduced into New Zealand at a time when Māori, although still far outnumbering Pākehā, had little or no power via the ballot box, and consultation with them about public works provisions was minimal. As far as we are aware, the 1885 discussion at Whareroa about rates to pay for roading (see secs 5.4.2 and 5.10.1) was the only early face-to-face conversation with Tauranga tangata whenua about anything relating to public works. Certain legislative provisions that were later introduced, such as centre-line

proclamations for railways and motorways, and the procedures for electricity infrastructure, were particularly harsh. We find that discriminatory procedures for notification, objection, and compensation were in breach of the Treaty principle that the Crown should act fairly as between Pākehā and Māori. Such procedures were frequently used in Tauranga and affected much Māori land. Right through until the later twentieth century, Māori land had fewer protections under the legislation than general land (see ch 4).

The expansion of Tauranga City to the east was done without consideration for the history of raupatu in the region: the eastern end of the harbour was precisely where much of the remaining Māori land was situated. Māori were not involved in key public works and planning decisions in Tauranga, and their interests and concerns were not protected. The result was that, from 1886 to 2006, at least 4961 acres of Māori land was taken for public works in Tauranga. This was a substantial part of their remaining estate, the loss of which they could ill-afford and it caused them serious prejudice. Further, many wāhi tapu of Tauranga Māori have been effectively destroyed by public works, and marae and urupā have been adversely affected, having a detrimental effect on Māori community life.

In order to fulfil the Treaty's guarantees, the Crown should have restricted the compulsory acquisition of Māori land to exceptional circumstances, in the last resort and in the national interest, as found by the Waitangi Tribunal in earlier reports.<sup>6</sup> Instead, for most of the twentieth century, compulsory acquisition was used for a very broad range of works, sometimes taking more land than strictly necessary, leading to unnecessary loss of Māori land. In sum, the Crown's public works policy and legislation have not protected Māori in accordance with the Treaty of Waitangi.

#### 11.2.4 Local government issues, including rating, valuation, and district planning

In terms of political representation, we find that the Crown has breached the Treaty in not providing for equitable levels of Māori representation at central and local government levels. This undermined the ability of Māori to defend their own rights and interests. At central government level, Māori do at least have the guarantee of some representation, even if the numbers have, until recently, been small. Environment Bay of Plenty, under its own empowering legislation passed in 2001, has more recently made provision for Māori electoral wards and has guaranteed Māori seats on its council. It stands alone in that. Under the Local Electoral Act 2001 and its Amendment Act in 2002, all local authorities have the option of establishing Māori wards, as Environment Bay of Plenty did, but none has done so. The legislation does not provide for Māori themselves to decide whether they wish to

6. See, for example: Waitangi Tribunal, *The Ngati Rangiteaorere Claim Report 1990*, 2nd ed (Wellington: GP Publications, 1996), pp 46–48; Waitangi Tribunal, *Te Maunga Railways Land Report*, 2nd ed (Wellington: GP Publications, 1996), p 71; Waitangi Tribunal, *The Ngai Tahu Ancillary Claims Report 1995*, 2nd ed (Wellington: GP Publications, 1997), p 11; Waitangi Tribunal, *The Turangi Township Report 1995* (Wellington: Brooker's Ltd, 1995), pp 285–286.



be represented as Māori, in accordance with the principal of options. Yet guaranteed Māori representation at local government is a logical extension of guaranteed representation at central government level. Further, we believe that the Crown has a partnership obligation to ensure that Māori have the opportunity to have dedicated Māori seats on local bodies. Alongside this, we note that on the administrative side of local government, Māori can still face an uphill struggle in getting their views heard, still less accepted, by advisory panels, consent authorities, or as local body employees.

Local authorities are not agents of the Crown. However, the Crown retains an overall duty of active protection towards Māori interests. This translates into a duty to monitor local government policies and practices to ensure that they are Treaty-compliant. Those policies and practices have been improving since 1988, especially at the operational level, but often still fall short of meeting Treaty standards.

In chapters 5 and 6, we also looked at the question of rating and valuation. On the Crown's own admission, valuation legislation (which in turn impacted on rating) did not, prior to 1997, take due account of the particular nature of Māori land and the tenure system under which it is held. The current legislation governing the office and functions of the Valuer-General is still deficient. In particular, the Valuer-General has no clear direction from the Crown to act in a manner which is consistent with the Treaty of Waitangi, or to recognise the relationships between Māori and their lands, waters, and wāhi tapu.

In the early years, the Crown exercised a measure of active protection in adopting a gradual approach to the rating of Māori land, but it was insufficient given the degree of Māori disadvantage. Under the terms of article 2, which guaranteed to Māori the full, exclusive, and undisturbed possession of their lands for as long as they wished to retain them, any forced taking of Tauranga Māori land for rates debt was unjustifiable and, indeed, egregious in light of the amount of land already taken from them under the raupatu. Further, in failing to mitigate rating pressures that resulted in, or contributed to, sales, the Crown was in breach of its duty of active protection.

Where land was retained, Māori aspirations for using it have often not been well accommodated by the Crown's rating regime, which aimed to foster best economic usage as its primary concern. We see this as a breach of the Crown's duty of active protection. In particular, in the context of increasing urbanisation, the Crown has often failed to uphold the Treaty principle of options for Tauranga Māori in the use of their land. That failure is all the more disappointing in light of the Crown's earlier role in the raupatu of Tauranga land. We also note that the current criteria for the remission or postponement of rates are not well adapted to providing relief for those Māori living in urban or peri-urban areas. Further, we are of the view that charges such as the uniform annual general charge are not an equitable way of taxing those in low-cost housing such as the units provided in papakāinga developments.

A large part of the rationale for charging rates is, of course, to provide services and

amenities, and the claimants alleged that, in some instances, the level of provision to Māori has been lower than to other sectors of the population. The evidence presented to us was insufficient to come to a definitive view on this matter, and we make no formal finding as to whether there was Treaty breach. However, the principle of equity would clearly demand that Māori receive no lesser provision of amenities than fellow citizens residing in like areas.

Another function of local government that has developed over the decades is district planning. In the period to 1977, we find the Crown to have been in breach of the Treaty in respect of its town and country planning legislation, which offered no specific protections around Māori land or Māori interests. Nevertheless, we note instances where despite (rather than because of) the Crown's planning and rating regimes, Tauranga County Council took some commendably proactive steps to address Māori concerns. We would cite, in particular, the appointment of a Māori Rates Officer in the late 1950s, and planning provision, from 1976 onwards, for marae community zones. We note, however, that Tauranga Māori are still in general under-resourced to participate in local government processes such as those relating to district planning, resource consents, and heritage protection.

#### 11.2.5 Environmental issues

The Treaty guaranteed to Tauranga Māori their rangatiratanga over their lands, forests, fisheries, and other taonga. They thus have an obligation to guard and care for those taonga as kaitiaki. Where Tauranga Māori have lost ownership of taonga against their will, and in breach of the principles of the Treaty, they may retain Treaty rights to exercise rangatiratanga and kaitiakitanga over those taonga. As we were told, the taonga of Tauranga Māori include the harbour, Tauranga Moana, significant waterways, and the native forests of the Kaimai Range.

Prior to 1991, the Crown consistently failed to recognise and provide for rangatiratanga and kaitiakitanga of Tauranga Māori over their moana, waterways, forests, and fisheries, in breach of the plain meaning of article 2, and of the principle of partnership and the duty of active protection. Furthermore, the Crown permitted the pollution of waterways, and the destruction of forests and fisheries, to an extent that left Tauranga Māori unable to sustain their traditional way of life, and unable to utilise their taonga as a base for economic development. In leaving the claimants in this position, the Crown breached the principle of options, and its duty of active protection, and has failed to provide adequate redress.

Since 1991, the Crown has provided mechanisms through which the claimants can potentially exercise rangatiratanga and kaitiakitanga over customary fisheries, waterways, and forests, but they are not always working well in practice. Some councils have been slow, for example, in coming to terms with requirements to engage with Māori in their planning processes. Likewise, provisions exist for local bodies to transfer, delegate, or share authority with Māori in the management of resources, but little has so far happened. And although

iwi management plans can be a powerful tool, there has often been inadequate resourcing – in terms of both funding and training – for iwi to be able to produce them. Much more active Crown involvement is required to avoid further breaches of the principle of partnership and the duty of active protection.

#### 11.2.6 Cultural heritage

The Treaty protects the rights of Tauranga Māori to exercise rangatiratanga (that is, authority and control) over the taonga of their cultural heritage, and to have that heritage treated equitably with Pākehā heritage.

Throughout the period from 1886 to 1990, the Crown did not adequately provide for Tauranga Māori to exercise rangatiratanga over their cultural heritage. The Crown thereby breached the principle of partnership and the duty of active protection. Also throughout the period from 1886 to 1990, the Crown provided Māori heritage with less protection than Pākehā heritage. The Crown's comparative disregard for the taonga of Māori culture was a sustained breach of the principle of equity and the duty of active protection.

Current legislation now provides some mechanisms for the expression of Māori rangatiratanga and kaitiakitanga over cultural heritage, but all too often these prove to be dead letters. There is, for example, the potential for Māori corporate bodies – such as iwi authorities, or Māori trusts or incorporations – to become heritage protection authorities, able to issue heritage protection orders. However, the risks and hurdles are such that, to date, nationwide, only five corporate bodies of any kind have been constituted heritage protection authorities – none of them Māori. Nor have many power-sharing arrangements between Māori and local authorities resulted, anywhere in the country, from the legislation as it currently stands. Without stronger support from the Crown, Tauranga Māori will not be in a position to exercise rangatiratanga and kaitiakitanga over their cultural heritage, and we find that the Crown has yet to properly meet its duty of active protection in this regard.

Until the passing of the Protected Objects Act 2006, the Crown's provisions for Māori to claim and care for their taonga tūturu (objects of material culture) were inadequate, and in breach of the duty of active protection. We are not able to determine the extent to which the 2006 Act is resolving this issue, since it falls outside the period covered by the evidence presented to us, but we remind the Crown that these processes will need active commitment and resources.

Overall, the current legislative regime is not providing adequate protection to the cultural heritage of Tauranga Māori, which continues to be lost at an alarming rate. The framework for protection is distributed across a number of poorly linked Acts, resulting in scattered information about cultural heritage, and poorly integrated efforts to protect it. The Crown's continuing failures are a breach of its duty of active protection and of the principle of equity.

**11.2.7 Socioeconomic issues**

Analysis of the census data for 2001 shows that Tauranga Māori are significantly disadvantaged, in relation to the non-Māori population of the inquiry district, across a wide range of socioeconomic indicators. As always with socioeconomic outcomes, numerous factors are involved, not all of them controllable by the Crown and its agents. For that reason, we make few findings of Treaty breach in relation to socioeconomic issues. Nevertheless, we make a number of observations which we trust the Crown will take into account in considering prejudice.

The enormous loss of land before 1886, and ongoing land loss almost to the present, contributed to the economic and social marginalisation of Māori in the Tauranga district, and reduced the ability of Tauranga hapū to share in the economic and social benefits of regional progress. All hapū were affected by ongoing land loss, and some were left with little or no land at all. Although the plight of the latter was repeatedly brought to the attention of the Crown, almost no effective action was taken: instead, any landlessness provisions were focused on individuals. Through its acts and omissions, the Crown is heavily implicated in land loss and the resulting prejudicial impacts. To the extent that the Crown has thereby contributed to the marginalisation of Tauranga Māori, we find it in breach of the principles of mutual benefit and equity.

Turning to consider the key socioeconomic indicators, we note that health services were provided for Māori in Tauranga from an early date, but they were patchy for many years. Services, including those targeted at Māori, were greatly expanded in the 1920s and afterwards, and financial barriers were eased by the Social Security Act in 1938 (although little acknowledgement of the need for culturally appropriate services was made until recent decades). With better Government-funded health services, the health status of Māori in Tauranga improved enormously during the twentieth century, but still lags behind that of non-Māori.

In terms of housing, we have seen that the Crown was slow to address the needs of Māori, even though those needs were clearly evident and poor housing was obviously having a negative effect on health. Even today, Māori housing standards in Tauranga are not equal to those of non-Māori. Loan assistance was provided by legislation from 1935, but it was many years before it was widely available. And although considerable rehousing was achieved in the 1950s and 1960s, much of it involved relocating to new urban subdivisions. Some Māori welcomed that; others did not, and would have preferred to have been rehoused on their traditional lands. Lack of Crown support meant that Māori were deprived of options, in breach of the Treaty. Today, too, Māori continue to face problems in building on multiply owned ancestral land, despite many recent efforts to resolve the legal, rating, planning, and financial issues involved. This impacts negatively on the aspirations of a number of Tauranga hapū to foster and promote a marae-centred community life.

Māori children in Tauranga Moana had access to State primary schools and a number of native schools throughout the period, and later were able to attend secondary schools. But for many years the Crown's expectations for Māori educational achievement were not high. There appears to be a relationship between this history and the over-representation of Māori workers among the unemployed and in unskilled or lower paid-employment. We also note the decline of te reo Māori and the Crown's policies concerning Māori language use in schools.

#### 11.2.8 Landbanking

In terms of landbanked properties for possible use in Treaty settlements, we find that no Treaty breach attaches to the Crown's disposal of surplus land and property not actually required for the settlement of Treaty claims. However, the landbanking of surplus Crown land and property for potential use as redress is clearly of particular importance in an area such as Tauranga where there is comparatively little land available for Treaty settlements, and we believe that the bar for deciding that a particular land or property is 'not required' must accordingly be set very high.

The Crown's revised policy on landbanking incorporates a number of changes which, taken together, result in less protection of claimants' interests for more claimant effort. In particular, there is potential for prejudice if tangata whenua either do not undertake the new application process or fail to fulfil the Crown's demands to the satisfaction of Crown officials.

The Crown's consultation process, prior to introducing the revised policy, was inadequate. We acknowledge that the Crown's partnership duty to consult is not absolute in all circumstances, but we uphold the view that there should be full and meaningful consultation on all matters of importance to Māori. There is no doubt about the importance of land to settling the claims of Tauranga Māori: the Tauranga raupatu district is more highly urbanised than any other raupatu district and Tauranga Māori have little chance of recouping much of what they lost. We accordingly find the Crown in breach of its Treaty duty in this matter.

Further, the Crown's requirement for claimants to review the Tauranga properties already held in the landbank represents a substantial burden of work, with no Crown assistance (other than information) being offered to help them complete the task. We find this to be a breach of the Crown's duty of active protection.

Overall, we find that Wai 1328, filed by Ngā Pōtiki in respect of the Crown's landbanking policy, is well founded and that there is the potential for prejudice not only to Ngā Pōtiki but to all Tauranga Māori.

### 11.3 RECOMMENDATIONS

A number of the issues investigated in this inquiry have been raised repeatedly by Tauranga iwi and hapū throughout the period from 1886 to 2006, at hui with central and local government, and by petitions, letters, submissions, and protests. As a general point, we urge the Crown to address the claims of Tauranga iwi and hapū as a matter of high priority. A failure to do so risks adding to long-held and deeply felt grievances that have rankled since the nineteenth century.

Also as a general point, we recommend greater collaboration and information flow between the various arms of government. In the course of examining the mountain of evidence presented in this inquiry, we have become aware of numerous situations where the actions of one government department or agency have cut across those of another, often to the detriment of Māori aspirations to hold, care for, and – where appropriate – develop their land and resources. We are firmly of the view that better coordination, and the sharing of information, might have averted some of the negative outcomes.

Our more specific recommendations follow.

#### 11.3.1 The return of land

Given the high level of land loss by Tauranga Māori, we reiterate the recommendation of the stage 1 report – namely, that the Crown make available for the settlement of claims in the Tauranga district as much land as it possibly can. In this context, we recommend that, pending settlement, the Crown revert to its earlier policy of automatically landbanking all surplus Crown land in the Tauranga area, irrespective of whether a supporting application has been made by Tauranga Māori. Further, noting that the current list of landbanked properties in the Tauranga region appears somewhat limited in terms of type and number,<sup>7</sup> we particularly recommend that the Crown carry out or facilitate research to investigate the fate of all land originally set aside as reserves for Tauranga hapū, especially in the area that now forms part of Tauranga City, with a view to returning as much of that land as may be viable. As in the stage 1 report, we do not make recommendations about which land should be returned to which iwi or hapū as we believe that is a matter for negotiation between claimants and the Crown.

#### 11.3.2 Land development

We begin by reiterating our view that, prior to 1886, the Crown had already, in depriving Tauranga Māori of some of their potentially most economically productive lands (including the area that was later to become the Athenree Forest), inflicted a significant opportunity

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7. 'Properties Managed by OTs April 2010', <http://www.ots.govt.nz/> (accessed 30 May 2010)

cost on Tauranga iwi and hapū in terms of their future land development options. We are further of the view that early hurdles and handicaps experienced by Māori in the development of their remaining land, particularly in the period prior to 1929, often came as a direct result of Crown policy and legislation. This led to competitive disadvantage and, in some cases, the complete loss of an income stream: Māori were not competing on a level playing field and, where this resulted in their ventures failing and their land being lost, they lost with it any hope of trying new land-based development ventures in the future. We believe that Tauranga Māori suffered ongoing prejudice as a result and we recommend generous compensation, along with extra assistance to help restore them to a sound economic footing.

We also recommend that the Crown consider new ways of assisting Tauranga Māori to retain their remaining land (and develop it, where such is their wish), and that particular attention be paid to assisting owners of multiply owned land (especially smaller pieces of land) in urban or peri-urban areas, where rates and pressure from private developers are both likely to be high.

### 11.3.3 Public works

We note that the *Wairarapa ki Tararua Report* recently summarised the recommendations of previous Tribunals in relation to public works, and further expanded on them. We urge that the Crown move without delay to adopt the various recommendations for legislative amendment set out in that report.<sup>8</sup>

For our own part, we particularly recommend a review of the public works compensation regime and the establishment of a compensation system that is properly in keeping with Treaty principles. We are of the view that Māori have had little influence on the current regime, with the consequence that there has been no formal consideration of how Māori values and interests might be valued for compensation purposes. We strongly urge, for instance, that where owners are required to give up the very last of their ancestral lands for public works, the compensation offered should recognise this fact. We believe that the compensation regime assumes particular importance in an urbanised district such as Tauranga, where the majority of Māori ancestral land has now been lost and where it is increasingly unlikely that equivalent lands will be found for exchange within the area.

Lastly, but by no means least, we urge that as part of the general redress recommended at the end of this report, the Crown endeavour to resolve as many as possible of the individual grievances raised in relation to public works issues in the Tauranga area, and to return land wherever practicable – noting that, although the areas of land involved are sometimes small, they are often of great importance to the whānau and hapū most directly affected. Where such a return of land does prove possible, we also suggest that the Crown might actively

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8. Waitangi Tribunal, *The Wairarapa ki Tararua Report* 3 vols (Wellington: Legislation Direct, 2010), vol 2, ch 8



assist Tauranga Māori to find ways of holding on to it and developing it, to prevent future loss.

#### 11.3.4 Local government issues, rating, valuation, and district planning

To ensure that Māori have an opportunity to be heard and to exert influence at the local level, we urge the Crown to find ways of achieving better representation of Māori, and particularly tangata whenua, at all levels of local government – at the council table, on council staff, on advisory panels, and as voters. We note that this recommendation accords with the view of the Wairarapa ki Tararua Tribunal as expressed in their recent report.<sup>9</sup> We also recommend that central government directly contribute to enabling the tangata whenua to participate in local government processes relating to, for example, district planning, resource consents, and heritage protection. This includes the Crown being willing to assist with funding and training.

With respect to rating, we support the recommendations of the Local Government Rates inquiry panel ('the rates panel'). One of those recommendations was that the Government 'collaborate in a joint exercise with the local government in developing a coordinated and consistent approach to rates remission policies for Māori land'. Such an approach, they said, would include:

- ▶ use of a register or remission list
- ▶ opportunity to remit up to 100% of rates
- ▶ full recognition of the factors/criteria to be used
  - unoccupied and unutilised
  - landlocked
  - fragmented ownership
  - conservation value
  - unsecured legal title
  - isolated and marginal land capability
  - a lack of management structures
  - service provided (or not provided)
  - a proactive approach rather than councils receiving applications from landowners
  - use of liaison offices to work with Māori landowners
  - the inclusion of land that was Māori land but transferred to general land through the 1967 amendment
  - a proactive approach linking land development and rates remission
  - regular inspections to ensure land complies with the policy

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9. Waitangi Tribunal, *Wairarapa ki Tararua Report*, vol 3, pp1062–1062

- specific reference to the matters listed in Schedule 11 of the Local Government Act 2002.<sup>10</sup>

Where Māori land is in multiple ownership *and* non-occupied *and* non-productive, we would go further than the rates panel and recommend total exemption from rates. Also, we note that the existing rating exemption for land used for the purposes of a marae or meeting place or burial ground applies only to areas of two hectares or less: we recommend the removal of that limit.<sup>11</sup> We note that exempting these categories of land would reduce the administrative burden of trying to collect rates on land unable to sustain such charges, and thus reduce local authority overheads. However, to obviate any residual disadvantage to local government, with possible repercussions for general ratepayers, we recommend that central government consider providing local government with some form of funding or targeted assistance. This would accord with the central government agency assistance already provided to areas such as Westland, which have a high percentage of non-rateable Department of Conservation land.<sup>12</sup>

Again in relation to multiply owned land, we note that where no management structure (such as a trust or incorporation) is in place, and the names and addresses of only one or two owners are known to the local authority, those owners may find themselves liable for all the rates on the land in question. We believe this is unfair and inequitable. We recommend that the rates liability of any individual owner be capped at an amount reflecting his or her percentage ownership or usage of the block (whichever is greater). We also recommend that the Māori Land Court be given a role in helping local authorities to establish better processes for identifying owners and occupiers, so that the rates burden may be distributed more equitably.

We see that the rates panel also recommended that:

a new basis for valuing Māori land for rating purposes be established that explicitly recognises the cultural context of Māori land, the objectives of Te Ture Whenua Māori Act 1993, and the inappropriateness of valuations for rating purposes being based on the 'market value' of Māori land . . .<sup>13</sup>

We agree, noting again that rating and valuation legislation are currently not well aligned. We recommend the introduction of new valuation legislation consistent with the Treaty of Waitangi and recognising the relationships between Māori and their lands, waters, and wāhi tapu.

10. Local Government Rates Inquiry Panel, *Funding Local Government: Report of the Local Government Rates Inquiry* (Wellington: Department of Internal Affairs, 2007), pp 224–225

11. Local Government (Rating) Act 2002, sch 1, pt 1, ss 10(b), 12(a)

12. West Coast Regional Council, 'Submission to Local Government Rating Inquiry' (submission no 575), West Coast Regional Council, pp 1–9; <http://district-plan.westland.govt.nz/LTCCP/financial/summaryassump.html> (accessed on 5 April 2010)

13. Local Government Rates Inquiry Panel, *Funding Local Government*, pp 14, 24, 224, 225

On the subject of district planning and local government legislation, we note that the Crown requires the local authority to monitor ‘community outcomes’, and the Auditor-General then checks that such monitoring has taken place. There is no check at any point, however, on how well those community outcomes measure up against the Treaty. We recommend that the Crown assign to Te Puni Kōkiri, or some other government agency, a role in ensuring that such a check is carried out at appropriate intervals.

#### **11.3.5 Environmental management**

We have noted that, since 1991, the regime for managing natural resources has become much more Treaty-compliant, but the provisions for Māori participation are not yet working well in practice. We recommend that the Crown actively investigate ways, on the one hand, of encouraging local authorities to better engage with the tangata whenua in their planning processes and in the management of natural resources and, on the other hand, of contributing funding and training, as needed, to enable tangata whenua to make the most of the legislative provisions available. Where the wider public also have a strong interest in taonga, as is the case with the harbour, significant waterways, and the native forests of the Kaimai Range, we recommend that the Crown explore possibilities for joint management between local government and Māori.

We are also concerned at the evidence of resource loss and environmental degradation, particularly in relation to the harbour and waterways. We therefore recommend that the Crown, in conjunction with the tangata whenua, investigate the possibilities for remedial action, and that the Crown contribute towards the cost of any projects identified.

#### **11.3.6 Cultural heritage**

The current division of roles and responsibilities under the historic places and resource management legislation is not working well in Tauranga Moana. Clearer assignment of responsibility for gathering information, and for administering protections, is needed. We recommend that the Crown give oversight of gathering of all information about heritage places, under the Historic Places Act, to the Historic Places Trust and the Māori Heritage Council (which is part of the trust). Complementary to that, we recommend that oversight of the protection mechanisms for those sites, under the Resource Management Act, be given to the territorial authorities.

We also urge that the Historic Places Trust be properly resourced to meet its existing statutory obligations to gather information on heritage sites. In particular, we believe that the Māori Heritage Council needs better resourcing to carry out its work, and that its role should be strengthened. For example, where development projects involve Māori cultural

heritage sites, the Māori Heritage Council could usefully have a role in organising the vetting of any archaeological reports submitted by the developer concerned.

In terms of future directions, we recommend that the Crown issue a national policy statement on heritage. This statement would give definitive guidance for local authorities in drafting objectives, policies, and rules for the protection of cultural heritage sites and items. As part of that work, the Māori Heritage Council should be given responsibility for drafting the national policy statement on Māori heritage. We also recommend that the Crown consider how more tangata whenua might be assisted to train as conservators of their taonga tūturu (objects of material culture).

More immediately, we recommend a major overhaul of the historic places register so that it is properly representative of Māori cultural heritage (not just buildings and archaeological sites). We also recommend that all items on the register be automatically included as scheduled items in the district plans of the relevant local authority. Once Māori sites have been scheduled and included in a district plan, the relevant iwi authorities should have a role in considering and deciding any applications for resource consents affecting those sites. That role should include the opportunity to contest any archaeological reports submitted by the developer. This is particularly important where a development project might involve the modification or destruction of a site.

Further, we recommend that the Crown investigate ways of improving the standard of archaeological advice available to local bodies and developers, particularly in respect of Māori sites. In New Zealand, a whole range of professionals – from accountants to veterinarians – are required, by law, to register with a professional body before being allowed to practise.<sup>14</sup> There is no such requirement for archaeologists, and in some cases this may lead to reliance being placed on opinions that are less than authoritative. All archaeological advice submitted in support of development applications affecting Māori sites should be contestable.

#### 11.4 REDRESS

We have now come to the end of stage 2 of the Tauranga inquiry and we do not anticipate any further inquiry being necessary (although the possibility of a remedies hearing remains open to the parties if required). In its stage 1 report, the Tribunal wrote:

We consider that a generous and expeditious remedy is required for Tauranga Maori for the prejudice suffered by them as a result of Crown laws, actions, and omissions. Such

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14. Immigration New Zealand, 'Occupational Registration', Immigration New Zealand, <http://www.immigration.govt.nz/migrant/stream/work/skilledmigrant/LinkAdministration/ToolboxLinks/occupationalregistration.htm> (accessed 25 May 2010)

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reparation is necessary not only to restore the honour of the Crown in its relationship with Tauranga Maori but also to establish an economic base from which Tauranga hapu can pursue their future aspirations. As we have continually emphasised in this report, Crown Treaty breaches mainly impacted on hapu and, given that, the ultimate settlement aim should be to restore the economic and social foundation of Tauranga hapu.<sup>15</sup>

We reiterate that view. Moreover, we believe that the prejudice identified in the stage 1 report has been significantly compounded by the further prejudice arising out of the Treaty breaches identified in our present report. Accordingly, the total amount of redress made to Tauranga hapū should be substantial and meaningful. We expect that it would include as much former reserve land as possible, particularly within the Tauranga city boundary. If the return of such land is not possible, additional monetary compensation will be necessary. Redress should also take account of the lost opportunity costs resulting from the economic marginalisation of Tauranga Māori over earlier decades. Nothing less is due to the iwi and hapū of Tauranga Moana, if they are to climb back to a point of substantive equality from which they can exercise a real degree of tino rangatiratanga over their lives and resources, pursue their aspirations, and realise their full potential to contribute to the well-being of the region and the nation as a whole.

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15. Waitangi Tribunal, *Te Raupatu o Tauranga Moana*, p 409

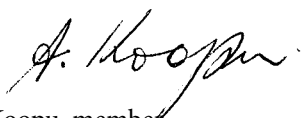
Dated at *Wellington* this *16th* day of *August* 20*10*



S T A Milroy, presiding officer



J Clarke, member



A Koopu, member



MPK Sorrenson, member







## APPENDIX I

### RECORD OF INQUIRY

#### RECORD OF HEARINGS

##### THE TRIBUNAL

The Tribunal constituted to hear stage 2 of Wai 215, concerning the Tauranga Moana claims between 1886 and 2006, comprised Judge Stephanie Milroy (presiding), Professor Keith Sorrenson, Areta Koopu, and John Clarke.

##### THE HEARINGS

###### First hearing

The first hearing was held at Maungatapu Marae, Maungatapu, from 29 May to 2 June 2006.

###### Second hearing

The second hearing was held at Whareroa Marae, Whareroa, from 3 to 7 July 2006.

###### Third hearing

The third hearing was held at the Armitage Hotel, Willow Street, Tauranga, from 9 to 13 October 2006.

###### Fourth hearing

The fourth hearing was held at the Armitage Hotel, Willow Street, Tauranga, from 30 October to 3 November 2006.

###### Fifth hearing

The fifth hearing was held at Hangarau Marae, Bethlehem, from 11 to 15 December 2006.

#### THE COUNSEL

The following list is a record of counsel who have been involved in the Wai 215 stage 2 inquiry.

Dominic Wilson and Barret Blaylock made submissions on behalf of Wai 210, Wai 637, Wai 751, and Wai 162 claimants; Michael Sharp made submissions on behalf of Wai 342, Wai 636, and Wai 1061 claimants; Spencer Webster made submissions on behalf of Wai 465, Wai 228, Wai 266, Wai 540, Wai 938, Wai 370, Wai 42(a), Wai 672, and Wai 503 claimants; Paul Majurey made submissions on behalf of Wai 454 and Wai 812 claimants; Paul Cooney and Tania Waikato made submissions on behalf of the local authorities; Kathy Ertel and Liz Cleary made submissions on behalf of Wai 362, Wai 717, Wai 947, Wai 1328, and Wai 1355 claimants; Stephen Bryers made submissions on behalf of Wai 727 claimants; John Koning made submissions on behalf of Wai 755 and Wai 807 claimants; Karen Feint and Areta Grey made submissions on behalf of Wai 664 claimants; Paul Harman made submissions on behalf of Wai 42(c) and Wai 522 claimants; Steve Clark made submissions on behalf of Wai 211, Wai 668, and Wai 227 claimants; Grant Powell and Sarah Eyre made submissions on behalf of Wai 100 and Wai 650 claimants; Toa Faulkner made submissions on behalf of Wai 489 claimants; Chris Lawrence made submissions on behalf of Wai 1226 claimants; Dominic Wilson made submissions on behalf of Wai 1178 claimants; Richard Boast and Jolene Patuawa made submissions on behalf of Wai 715 and Wai 854 claimants; Richard Boast and Liz Macpherson made submissions on behalf of Wai 255 and Wai 1340 claimants; Helen Carrad, Andrew Irwin, David Laird, Tania Warburton, and Sally McKechnie made submissions on

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behalf of the Crown; Helen Carrad and Andrew Irwin also made submissions on behalf of Transit New Zealand.

At this point, we particularly wish to mark the sad passing of Jolene Patuawa-Tuilave, on 24 June 2010. She contributed significantly to this inquiry, and her loss will continue to be keenly felt by all those who knew her. Haere rā e hine ki a rātou ou tupuna. Moe mai i roto i ngā ringa o te Atua.

RECORD OF PROCEEDINGS

1. THE CLAIMS

1.1 Wai 42

A claim lodged by Anaru Kohu senior and others concerning Ngāti Ranginui land, 13 September 1987

(a) A claim lodged by Gordon Pihema and others concerning Wairoa land, 19 October 1986  
Amendment to claim 1.1, 5 November 1998

(b) A claim lodged by Jacqueline Sayers concerning confiscation and trespass action in the district court, 20 May 1987

(c) A claim lodged by David Murray and others concerning confiscation and Katikati railway land, 22 December 1986

Addition to claims 1.1(c) and 1.24, 4 March 2001  
Second amendment to claims 1.1(c) and 1.24(b), 10 March 2006

(d) A claim lodged by Alex Tata and others concerning Tauranga Town Hall site, 28 August 1987

1.2 Wai 47

A claim lodged by William Ohia concerning Ngāti Pūkenga, Ngāi Te Rangī, and Ngāti Ranginui land and resources, 23 February 1990

1.3 Wai 159

A claim lodged by Isabel Berkett concerning Tūhua Island, 10 August 1990

(a) Addition to claim 1.3, 25 March 1991

1.4 Wai 162

A claim lodged by Wiremu Ohia concerning Kopukairoa land, 20 March 1990

(a) Memorandum seeking to change named claimant to Rahera Ohia, 30 March 2005

(b) Amendment to claim 1.4, 10 March 2006

1.5 Wai 208

A claim lodged by Raymond Dillon on behalf of the Ngāti Kāhu Te Pura Trust concerning the Bethlehem School site, 30 March 1987

1.6 Wai 209

A claim lodged by Jim Gray on behalf of the Ōtawa Kaiate Trust concerning Ōtawa blocks, 13 April 1987

1.7 Wai 210

A claim lodged by Keepa Smallman concerning Ngāti Pūkenga land taken for public works, 27 January 1988

(a) Amendment to claim 1.7, 10 March 2006

1.8 Wai 211

A claim lodged by Mahaki Ellis concerning the Whareroa blocks, 24 June 1988

(a) Addition to claim 1.8, 1 September 1997

(b) Addition to claim 1.8, 3 November 1997

(c) Addition to claim 1.8, 13 January 1998

(d) Addition to claim 1.8, 19 January 1998

(e) Amendment to claim 1.8, 31 July 1998

(f) Memorandum seeking to add Hine-Marie Rangi-Maria Burton as a named claimant, 13 May 2005

(g) Amendment to claim 1.8, 20 February 2006

1.9 Wai 227

A claim lodged by Kupara Tipi Faulkner concerning Te Puna land, 14 August 1991

(a) Amendment to claim 1.9, 22 April 1998

(b) Memorandum seeking to add Atiraia Ake Bidois as a named claimant, 23 May 2007

1.10 Wai 228

A claim lodged by Christine Taiawa Kuka-McGlynn and others concerning Matakana Island, 15 August 1991

(a) Amendment to claim 1.10, 15 August 1991

(b) Amendment to claim 1.10, 23 May 1994

(c) Amendment to claim 1.10, 3 December 2000

(d) Amendment to claim 1.10, 17 January 2006

(e) Amendment to claim 1.10, 10 March 2006

1.11 Wai 266

A claim lodged by Sonny Tawhiao concerning Matakana Island, 3 December 1991

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- (a) Amendment to claim 1.11, 19 November 1992
- (b) Amendment to claim 1.11, 10 March 2006

**1.12 Wai 336**

A claim lodged by Des Kahotea concerning ancestral land and the Energy Companies Act 1992, 18 February 1993

**1.13 Wai 342**

A claim lodged by Toa Haere Faulkner concerning Ngāti Hē land, 6 February 1993

- (a) Amendment to claim 1.13, 25 November 2000
- (b) Amendment to claim 1.13, 7 December 2000
- (c) Amendment to claim 1.13, 13 March 2006
- (d) Addition to claim 1.13(c), 6 December 2006

**1.14 Wai 353**

A claim lodged by Patrick Nicholas concerning Mount Maunganui and Tauranga city land, 31 May 1993

- (a) Amendment to claim 1.14, 15 November 1993

**1.15 Wai 356**

A claim lodged by Patrick Nicholas and others concerning land from Wairoa to Katikati, 31 May 1993

- (a) Amendment to claim 1.15, 25 July 1994
- (b) Amendment to claim 1.15, 2 August 1994
- (c) Amendment to claim 1.15, 25 July 1994
- (d) Amendment to claim 1.15, 25 July 1994
- (e) Amendment to claim 1.15, 25 July 1994
- (f) Amendment to claim 1.15, 25 July 1994
- (g) Amendment to claim 1.15, 10 October 1994
- (h) Amendment to claim 1.15, 22 November 1994
- (i) Amendment to claim 1.15, 22 November 1994

**1.16 Wai 360**

A claim lodged by Lance Waaka concerning Matapihi–Ohuki 3, 25 June 1993

**1.17 Wai 362**

A claim lodged by Lance Waaka concerning Tauranga confiscated land, 25 June 1993

- (a) Amendment to claim 1.17, 31 August 2001
- (b) Amendment to claim 1.17, 31 August 2001
- (c) Amendment to claim 1.17, 10 February 2006
- (d) Amendment to claim 1.17, 10 March 2006
- (e) Memorandum seeking to add Denis Ranui Harrison as a named claimant, 6 June 2006

**1.18 Wai 365**

A claim lodged by Rawiri Tooke concerning Matakana Island, 31 March 1993

- (a) Amendment to claim 1.18, 28 February 1995

**1.19 Wai 383**

A claim lodged by Colin Bidois concerning the Te Puna–Katikati blocks, 13 September 1993

**1.20 Wai 465**

A claim lodged by Linda Grey concerning Maungatapu and Kaitimako land, 22 September 1994

**1.21 Wai 489**

A claim lodged by Toa Haere Faulkner concerning Whareroa blocks and fishing rights in Tauranga Harbour, 2 December 1994

- (a) Amendment to claim 1.21, 15 November 1995
- (b) Entry vacated
- (c) Entry vacated
- (d) Amendment to claim 1.21, 3 July 2006

**1.22 Wai 497**

A claim lodged by Toa Faulkner concerning Bay of Plenty Polytechnic, Tauranga, 7 April 1995

**1.23 Wai 503**

A claim lodged by Michael Tane O'Brien concerning Tauwharawhara, Te Papa Paengaroa, Kaimai, and Whati Karanui, 20 March 1995

- (a) Amendment to claim 1.23, 11 May 1999

**1.24 Wai 522**

A claim lodged by Kevin Bluegum concerning land from Waipapa Stream to Waiau Stream, parts of Athenree Forest, and Matakana Island, 14 June 1995

- (a) Addition to claim 1.24, 4 March 2001

**1.25 Wai 540**

A claim lodged by Kihi Ngatai concerning Mauao, Moturiki Island, Motuotau Island, Karewa Island, and Tauranga Harbour bed, 24 July 1995

- (a) Amendment to claim 1.25, 18 June 1997
- (b) Amendment to claim 1.25, 13 September 2000
- (c) Amendment to claim 1.25, 10 March 2006

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**1.26 Wai 546**

A claim lodged by Tureiti Stockman concerning Ngāti Tapu land, 12 September 1995

- (a) Amendment to claim 1.26, 16 June 1996
- (b) Amendment to claim 1.26, 12 February 1998
- (c) Amendment to claim 1.26, 15 May 2000
- (d) Memorandum seeking to change named claimant to Puhirake Ihaka, 22 August 2007

**1.27 Wai 580**

A claim lodged by Toa Haere Faulkner and others concerning the Otamataha lands, 6 February 1996

**1.28 Wai 603**

A claim lodged by Wirepa Te Kani and others concerning the Papakanui Trust, 14 June 1996

**1.29 Wai 370**

A claim lodged by Toa Faulkner concerning Tauranga confiscated land, 24 June 1993

- (a) Amendment to claim 1.29, 25 May 2000
- (b) Memorandum seeking to add Te Pio Kawe as named claimant, 25 May 2006

**1.30 Wai 611**

A claim lodged by Christopher Tangitu concerning Ngāti Ranginui interests in Tauranga Moana, 3 June 1996

**1.31 Wai 636**

A claim lodged by Rangi Makarauri concerning section 6B1A of the Pāpāmoa 2 block, 27 March 1996

- (a) Amendment to claim 1.31, 7 April 2000
- (b) Addition to claim 1.31(a), 6 December 2006

**1.32 Wai 637**

A claim lodged by Shane Ashby concerning the Tauranga confiscation, 1 October 1996

- (a) Amendment to claim 1.32, undated
- (b) Amendment to claim 1.32, 10 March 2006

**1.33 Wai 645**

A claim lodged by Enoka Ngatai concerning the Tauranga Moana Māori Trust Board Act 1981, 7 November 1996

- (a) Addition to claim 1.33, 14 October 1997

**1.34 Wai 650**

A claim lodged by Toko Renata Te Taniwha and others concerning the Athenree Forest and surrounding lands, 24 December 1996

- (a) Amendment to claim 1.34, 1 October 2001

**1.35 Wai 659**

A claim lodged by Desmond Tata and others concerning Ngāi Tamarawaho land, 22 January 1997

- (a) Amendment to claim 1.35, 6 January 2000

**1.36 Wai 664**

A claim lodged by Thomas McCausland and others concerning Waitaha land, 14 February 1997

- (a) Amendment to claim 1.36, 2 November 2001
- (b) Amendment to claim 1.36, 10 March 2006
- (c) Amendment to claim, 1.36, 6 April 2006

**1.37 Wai 668**

A claim lodged by Wi Te Kani concerning Ngāi Tukairangi land, 27 March 1997

- (a) Amendment to claim 1.37, 20 February 2006

**1.38 Wai 672**

A claim lodged by Michael O'Brien and others concerning Ngāti Hangarau land, 7 April 1997

- (a) Amendment to claim 1.38, 11 May 1999

**1.39 Wai 86**

A claim lodged by Peri Kohu and others concerning Waikareao Estuary, 10 October 1988

- (a) Application for urgent hearing concerning Waikareao Estuary, 16 March 1990

**1.40 Wai 701**

A claim lodged by Colin Bidois and others concerning Te Puna–Katikati blocks and the Athenree Forest, 18 February 1998

**1.41 Wai 702**

A claim lodged by Taane Karaka and others concerning Waitaha lands and resources, 21 January 1998

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**1.42 Wai 707**

A claim lodged by Hoki Leef-Bruce and another concerning lots 16 and 154 of the parish of Te Puna, undated

**1.43 Wai 708**

A claim lodged by Hoki Leef-Bruce and another concerning Tauranga Harbour, undated

**1.44 Wai 714**

A claim lodged by Hone Williams concerning Ngāti Koi reserves and other blocks, 23 March 1998

**1.45 Wai 715**

A claim lodged by Jackson White concerning Matakana Island, 17 April 1998

- (a) Amendment to claim 1.45, 10 March 1999
- (b) Amendment to claim 1.45, 26 April 1999
- (c) Amendment to claim 1.45, 10 February 2006

**1.46 Wai 717**

A claim lodged by Matire Duncan and others concerning confiscation and public works takings, 11 May 1998

- (a) Amendment to claim 1.46, 23 June 1999
- (b) Amendment to claim 1.46, 10 February 2006
- (c) Amendment to claim 1.46, 10 March 2006

**1.47 Wai 727**

A claim lodged by Rapata (Bob) Leef and others concerning lands and resources of Pirirakau hapū, undated

- (a) Amendment to claim 1.47, 7 March 2001
- (b) Amendment to claim 1.47, 24 April 2001

**1.48 Wai 751**

A claim lodged by Te Awanuiarangi Black concerning the Ngāpeke block, 4 September 1998

- (a) Amendment to claim 1.48, 10 March 2006

**1.49 Wai 755**

A claim lodged by Tureiti Stockman and others concerning Rangiwaea Island, 10 September 1998

**1.50 Wai 773**

A claim lodged by Tureiti Stockman concerning lot 210 of the parish of Te Puna, 2 January 1999

**1.51 Wai 778**

A claim lodged by Tewiremu Mataia on behalf of Te Rūnanga a Iwi o Ngāti Tamatera concerning Ngāti Tamatera land and taonga, 12 November 1998

**1.52 Wai 807**

A claim lodged by Desmond Tata and another concerning Mōtiti Island, 28 August 1999

**1.53 Wai 817**

A claim lodged by Neil Hirama concerning the Whareroa 2G1A block, 24 February 1999

**1.54 Wai 821**

A claim lodged by Reginald Hodge concerning Māori customary fishing, 16 December 1999

**1.55 Wai 853**

A claim lodged by Peri Kohu and others concerning the Local Government Act 1974 and Tauranga land, 20 January 2000

**1.56 Wai 854**

A claim lodged by John Toma concerning Tuingara lot 7 on Matakana Island, 10 April 2000

- (a) Amendment to claim 1.56, 10 February 2006

**1.57 Wai 454**

A claim lodged by Walter Taipari and Adrian Taipari concerning Marutuahu land, 17 April 1994

- (a) Amendment to claim 1.57, 5 March 2001

**1.58 Wai 812**

A claim lodged by Clive Majurey concerning Marutuahu land and taonga, 21 January 2000

- (a) Amendment to claim 1.58, 5 March 2001

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**1.59 Wai 938**

A claim lodged by Te Karehana Wicks concerning Ngāi Tauwhao land and resources, 23 May 2001  
(a) Amendment to claim 1.59, 10 March 2006

**1.60 Wai 947**

A claim lodged by Hori Ngatai concerning Ngāti Kuku land, 31 August 2001  
(a) Amendment to claim 1.60, 24 August 2006

**1.61 Wai 255**

A claim lodged by Lucy Reuben and others concerning Ngāti Mahana, 10 March 1989  
(a) Memorandum seeking to change named claimant to Gloria Koia, 27 September 2005  
(b) Amendment to claim 1.61, 10 February 2005

**1.62 Wai 1178**

A claim lodged by Te Awanuiarangi Black and another concerning a section of Waitaha, 20 May 2004  
(a) Amendment to claim 1.62, 10 March 2006

**1.63 Wai 1226**

A claim lodged by Morehu McDonald of the Ngāti Hinerangi Trust concerning the loss of lands and resources in the Waiharakeke, Kaokaoroa o Patetere, Kaimai, Whakamaramara, and Mata-mata regions, 3 February 2005  
(a) Amendment to claim 1.63, 23 February 2006

**1.64 Wai 1328**

A claim lodged by Matire Duncan concerning the Crown's land banking policy in raupatu areas, 11 October 2005

**1.65 Wai 1340**

A claim lodged by James Clair concerning Ngāti Motai interests in the Tauranga Moana inquiry district, 12 December 2006  
(a) Amendment to claim 1.65, 10 February 2005

**1.66 Wai 443**

A claim lodged by Wally Papa and others concerning Ngāti Raukawa, 27 September 1994  
(a) Amendment to claim 1.66, 19 February 1995  
(b) Amendment to claim 1.66, 2 November 2004  
(c) Amendment to claim 1.66, 8 December 2004

**1.67 Wai 1061**

A claim lodged by Huriana Taite and others concerning the Mangatawa 2 block, 16 December 2001  
(a) Addition to claim 1.67, 7 December 2006

**1.68 Wai 1355**

A claim lodged by Marahera Kakau concerning the public works acquisition of Pāpāmoa 2 section 8A, 29 August 2006

**2. STAGE 2 PAPERS IN PROCEEDINGS**

**2.423** Direction requesting views concerning stage 2 inquiry, 7 February 2005

**2.424** memorandum on behalf of claimants concerning extension for filing response to direction of Tribunal, 25 February 2005

**2.425** Memorandum on behalf of the Crown concerning delay in filing for stage 2 inquiry, 28 February 2005

**2.426** Memorandum on behalf of Wai 727 claimants concerning direction of Tribunal, 25 February 2005

**2.427** Submissions on behalf of Wai 162, Wai 210, Wai 637, and Wai 751 claimants concerning direction of Tribunal, 2 March 2005

**2.428** Memorandum on behalf of the Crown concerning direction of Tribunal, 2 March 2005

**2.429** Joint memorandum on behalf of Wai 540, Wai 228, Wai 266, Wai 938, Wai 211, Wai 755, Wai 807, Wai 342, Wai 717, Wai 546, Wai 636, Wai 947, Wai 362, Wai 522, Wai 854, Wai 672, Wai 503, Wai 42(a), Wai 370, Wai 659, and Wai 664 claimants concerning direction of Tribunal, 4 March 2005

**2.430** Direction concerning outstanding Tauranga issues to be heard in stage 2 inquiry, 6 April 2005

**2.431** Joint memorandum on behalf of claimants concerning direction of Tribunal, 11 May 2005

**2.432** Direction to register addition to Wai 211 and Wai 963 claims, 26 May 2005

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| <p><b>2.433</b> Memorandum on behalf of claimants concerning progress of joint committee, 26 July 2005</p> <p><b>2.434</b> Direction concerning judicial conference, 23 August 2005</p> <p><b>2.435</b> Memorandum on behalf of joint committee concerning stage 2 inquiry, 26 August 2005</p> <p><b>2.436</b> Memorandum on behalf of joint committee concerning possible stage 2 hearings, 26 August 2005</p> <p><b>2.437</b> Direction concerning matters to be addressed at judicial conference, 9 September 2005</p> <p><b>2.438</b> Memorandum on behalf of Wai 1226 claimants concerning stage 2 inquiry, 19 September 2005</p> <p><b>2.439</b> Memorandum on behalf of Wai 1061 claimants concerning judicial conference, 29 September 2005</p> <p><b>2.440</b> Memorandum on behalf of Wai 636 claimants concerning judicial conference, 29 September 2005</p> <p><b>2.441</b> Memorandum on behalf of Wai 342 claimants concerning judicial conference, 29 September 2005</p> <p><b>2.442</b> Memorandum on behalf of Crown Forestry Rental Trust concerning the trust's assistance for claimants in stage 2 inquiry, 30 September 2005</p> <p><b>2.443</b> Joint memorandum on behalf of Wai 540, Wai 228, Wai 266, Wai 938, Wai 465, Wai 211, Wai 342, Wai 1061, Wai 636, Wai 854, Wai 947, Wai 717, Wai 755, Wai 807, Wai 522, and Wai 42(c) claimants concerning stage 2 inquiry, 30 September 2005</p> <p><b>2.444</b> Memorandum on behalf of Wai 290 claimants concerning stage 2 inquiry, 30 September 2005</p> <p><b>2.445</b> Memorandum on behalf of Wai 1226 claimants concerning stage 2 inquiry, 3 October 2005</p> | <p><b>2.446</b> Direction concerning stage 2 inquiry, 8 November 2005</p> <p><b>2.447</b> Memorandum on behalf of Wai 1340 claimants concerning stage 2 inquiry, 25 November 2005</p> <p><b>2.448</b> Direction concerning consolidating new Ngāti Motai claims, 7 December 2005</p> <p><b>2.449</b> Joint memorandum on behalf of claimants and Crown concerning stage 2 hearing timetable, 23 December 2005</p> <p><b>2.450</b> Direction concerning joint memorandum on behalf of claimants and Crown, 17 January 2006</p> <p><b>2.451</b> Memorandum on behalf of Wai 255 claimants concerning filing of evidence, 10 February 2006</p> <p><b>2.452</b> Memorandum on behalf of Wai 1340 claimants concerning filing of evidence, 10 February 2006</p> <p><b>2.453</b> Memorandum on behalf of Wai 715 claimants concerning filing of evidence, 10 February 2006</p> <p><b>2.454</b> Memorandum on behalf of Wai 854 claimants concerning filing of evidence, 10 February 2006</p> <p><b>2.455</b> Memorandum on behalf of Wai 664 claimants concerning extension for filing of evidence, 14 February 2006</p> <p><b>2.456</b> Submissions on behalf of Wai 162, Wai 210, Wai 637, and Wai 751 claimants concerning filing of evidence, 15 February 2006</p> <p><b>2.457</b> Michael Belgrave, 'Tauranga Stage 2 Casebook Review', 22 February 2006</p> <p><b>2.458</b> Memorandum on behalf of the Crown concerning judicial conference, 24 February 2006</p> <p><b>2.459</b> Memorandum on behalf of claimants concerning stage 2 draft statement of issues, 24 February 2006</p> <p><b>2.460</b> Stage 2 draft statement of issues, 24 February 2006</p> |
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- 2.461** Memorandum on behalf of Wai 1226 claimants concerning filing of evidence, 24 February 2006
- 2.462** Memorandum on behalf of Wai 664 and Wai 659 claimants concerning participation in stage 2 inquiry, 27 February 2006
- 2.463** Direction appointing Judge Milroy as Presiding Officer for the Tauranga Moana inquiry, 27 February 2006
- 2.464** Direction concerning research requirements and filing dates, 3 March 2006  
(a) Entry vacated  
(b) Entry vacated
- 2.465** Direction concerning hearing dates and venues, 17 March 2006
- 2.466** Direction concerning proposed research for stage 2 inquiry, 17 March 2006
- 2.467** Memorandum on behalf of Wai 664 claimants concerning filing of evidence, 6 April 2006
- 2.468** Memorandum on behalf of claimants concerning stage 2 draft statement of issues, 24 February 2006
- 2.469** Memorandum on behalf of Wai 664 and Wai 659 claimants concerning filing of evidence, 10 March 2006
- 2.470** Memorandum on behalf of Wai 255 and Wai 290 claimants concerning filing of evidence, 10 March 2006
- 2.471** Memorandum on behalf of Wai 342 claimants concerning extension for filing of evidence, 16 March 2006
- 2.472** Joint memorandum on behalf of the Crown and claimants concerning direction of Tribunal, 11 April 2006
- 2.473** Stage 2 statement of issues, undated
- 2.474** Notice by Wai 540, Wai 228, Wai 266, Wai 938, Wai 672, Wai 503, Wai 42(a), and Wai 370 claimants of change of address for service, 13 April 2006
- 2.475** Direction concerning hearing procedure for stage 2 inquiry, 13 April 2006
- 2.476** Memorandum on behalf of Wai 255 and Wai 1340 claimants concerning presentation of evidence, 28 April 2006
- 2.477** Memorandum on behalf of Wai 100 and Wai 650 claimants concerning Wai 255 and Wai 1340 claimant memorandum, 28 April 2006
- 2.478** Memorandum on behalf of Wai 255 and Wai 1340 claimants concerning presentation of evidence, 8 May 2006
- 2.479** Notice of first hearing for stage 2 inquiry, 10 May 2006
- 2.480** Memorandum on behalf of Wai 1226 claimants concerning presentation of evidence, 10 May 2006
- 2.481** Application on behalf of local councils concerning participation as interested parties in stage 2 inquiry, 12 May 2006
- 2.482** Direction to register amendment to Wai 162 claim, 22 December 2005
- 2.483** Notice of change of representation for Wai 755 and Wai 807 claimants, 8 May 2006
- 2.484** Joint memorandum on behalf of claimants concerning conflict of interest in representation, 19 May 2006
- 2.485** Memorandum on behalf of Wai 162, Wai 210, Wai 637, and Wai 751 claimants concerning filing of evidence, 22 May 2006
- 2.486** Memorandum on behalf of local authorities concerning conflict of interest in representation, 23 May 2006
- 2.487** Direction concerning issues for inquiry in the stage 2 hearings, 23 May 2006
- 2.488** Memorandum on behalf of Wai 342 claimants concerning filing of evidence, 23 May 2006
- 2.489** Timetable for week one hearing, undated

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- 2.490** Direction to consolidate Wai 1328 claim and aggregate Wai 255, Wai 1178, and Wai 1226 claims, 25 May 2006
- 2.491** Direction to register amended statements of claim for Wai 42(c), Wai 522, Wai 162, Wai 210, Wai 211, Wai 228, Wai 266, Wai 255, Wai 342, Wai 362, Wai 540, Wai 637, Wai 664, Wai 715, Wai 717, Wai 854, Wai 938, Wai 1178, Wai 1226, and Wai 1340, 25 May 2006
- 2.492** Joint memorandum on behalf of claimants concerning conflict of interest issue, 26 May 2006
- 2.493** Memorandum on behalf of local authorities concerning claimant joint memorandum, 26 May 2006
- 2.494** Direction to register Wai 1340 claim, 16 May 2006
- 2.495** Direction to register Wai 1328 claim, 22 December 2005
- 2.496** Memorandum on behalf of Wai 255 and Wai 1340 claimants concerning hearing timetable for weeks three and four, 31 May 2006
- 2.497** Submissions on behalf of Wai 717 claimants, 7 June 2006
- 2.498** Direction concerning hearing and filing dates for evidence, 9 June 2006
- 2.499** Direction to register amended statement of claim for Wai 668, 7 June 2006
- 2.500** Direction to register amended statement of claim for Wai 362, 7 June 2006
- 2.501** Direction to register amended statement of claim for Wai 370, 7 June 2006
- 2.502** Direction to release audio recordings of stage 1 hearings, 16 June 2006
- 2.503** Memorandum on behalf of Wai 664 claimants concerning presentation of evidence, 26 June 2006
- 2.504** Memorandum on behalf of Wai 715 and Wai 854 claimants concerning filing of evidence, 26 June 2006
- 2.505** Memorandum on behalf of Wai 255 and Wai 1340 claimants concerning week three hearing, 26 June 2006
- 2.506** Memorandum on behalf of Wai 540 claimants concerning filing of evidence, 26 June 2006
- 2.507** Memorandum on behalf of Wai 162, Wai 210, Wai 637, and Wai 751 claimants concerning filing of evidence, 26 June 2006
- 2.508** Memorandum on behalf of Wai 755 and Wai 807 claimants concerning filing of evidence, 27 June 2006
- 2.509** Joint memorandum on behalf of Wai 255, Wai 1340, Wai 454, and Wai 812 claimants concerning direction of Tribunal, 29 June 2006
- 2.510** Draft timetable for week two hearing, undated  
**(a)** Final timetable for week two hearing, undated  
**(b)** Amended timetable for week two hearing, undated
- 2.511** Memorandum on behalf of Wai 100 and Wai 650 claimants concerning week three hearing, 30 June 2006
- 2.512** Memorandum on behalf of the Crown with written questions for Christine Taiawa Kuka, 30 June 2006
- 2.513** Memorandum on behalf of the Crown with written questions for Te Karehana Wicks, 30 June 2006
- 2.514** Memorandum on behalf of the Crown with written questions for Te Keepa Smallman, 30 June 2006
- 2.515** Memorandum on behalf of Wai 1226 claimants concerning week three hearing, 29 June 2006
- 2.516** Memorandum on behalf of Wai 664 claimants concerning week three hearing, 1 July 2006
- 2.517** Memorandum on behalf of the Crown concerning filing written questions to stage 1 technical witnesses, 30 June 2006

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- 2.518** Memorandum on behalf of Wai 454 and Wai 812 claimants concerning week three hearing, 2 July 2006
- 2.519** Joint memorandum on behalf of Wai 1340, Wai 255, Wai 454, Wai 812, Wai 100, Wai 650, Wai 1226, Wai 362, and Wai 664 claimants concerning week three hearing timetable, 24 July 2006
- 2.520** Memorandum on behalf of the Crown concerning weeks one and two hearing transcripts, 25 July 2006
- 2.521** Memorandum on behalf of Wai 162, Wai 210, Wai 637, and Wai 751 claimants concerning answers to the Crown's written questions for Te Keepa Smallman, 28 July 2006
- 2.522** Memorandum on behalf of the Crown concerning filing written questions to stage 1 technical witnesses, 28 July 2006
- 2.523** Memorandum on behalf of the Crown with written questions for Kathryn Rose, 28 July 2006
- 2.524** Memorandum on behalf of the Crown with written questions for Rachel Willan, 28 July 2006
- 2.525** Memorandum on behalf of the Crown with written questions for Richard Kay and Heather Bassett, 28 July 2006
- 2.526** Memorandum on behalf of the Crown with written questions for Marinus La Rooij, 28 July 2006
- 2.527** Memorandum on behalf of the Crown with written questions for Heather Bassett and Richard Kay, 2 August 2006
- 2.528** Memorandum on behalf of the Crown with written questions for Grant Young, 2 August 2006
- 2.529** Memorandum on behalf of the Crown with written questions for Heather Bassett, 2 August 2006
- 2.530** Memorandum on behalf of the Crown with written questions for Marinus La Rooij, 2 August 2006
- 2.531** Memorandum on behalf of local authorities concerning requests under the Local Government Official Information and Meeting Act 1987, 3 August 2006
- 2.532** Memorandum on behalf of Wai 362 and Wai 717 claimants concerning request for information from local authorities, 1 August 2006
- 2.533** Joint memorandum on behalf of Wai 255, Wai 1340, and Wai 1226 claimants concerning presentation of claimant-commissioned mana whenua evidence, 4 August 2006
- 2.534** Memorandum on behalf of claimants concerning final week of hearings, 11 August 2006
- 2.535** Direction concerning remaining hearings and other matters, 14 August 2006
- 2.536** Timetable for week 4 hearing, undated
- 2.537** Memorandum on behalf of claimants concerning extension for filing of evidence, 31 August 2006
- (a)** Statement of Marahera Sheryl Kakau concerning application for urgency, 29 August 2006
- 2.538** Direction to determine application for urgent hearing from the Kakau whānau, 5 September 2006
- 2.539** Responses to the Crown's written questions (2.524) by Rachel Willan, undated 2006
- 2.540** Responses to the Crown's written questions (2.528) by Dr Grant Young, September 2006
- 2.541** Memorandum on behalf of Trust Power concerning participation in stage 2 inquiry, 21 September 2006
- 2.542** Memorandum on behalf of Wai 255 and Wai 1340 claimants concerning filing of evidence, 25 September 2006
- 2.543** Memorandum on behalf of Wai 362 claimants concerning filing of evidence, 25 September 2006

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| <p><b>2.544</b> Memorandum on behalf of Wai 100 and Wai 650 claimants concerning filing of evidence, 25 September 2006</p> <p><b>2.545</b> Memorandum on behalf of Wai 1226 claimants concerning extension for filing of evidence, 25 September 2006</p> <p><b>2.546</b> Memorandum on behalf of Wai 454 and Wai 812 concerning filing of evidence, 25 September 2006</p> <p><b>2.547</b> Responses to the Crown's written questions (2.529) by Heather Bassett, 27 September 2006</p> <p><b>2.548</b> Responses to the Crown's written questions (2.525) by Heather Bassett and Richard Kay, 27 September 2006</p> <p><b>2.549</b> Responses to the Crown's written questions (2.527) by Heather Bassett and Richard Kay, 26 September 2006</p> <p><b>2.550</b> Memorandum of Richard Boast concerning extension for filing submissions, undated</p> <p><b>2.551</b> Memorandum on behalf of Wai 255 and Wai 1340 claimants concerning confidentiality orders, 27 September 2006</p> <p><b>2.552</b> Responses to the Crown's written questions (2.512) by Christine Taiawa Kuka, undated<br/>(a) Memorandum on behalf of the Crown concerning application for urgency, 27 September 2006</p> <p><b>2.553</b> Memorandum on behalf of claimants concerning responses to the Crown's written questions (2.512) by Christine Taiawa Kuka, 27 September 2006</p> <p><b>2.554</b> Memorandum on behalf of Wai 664 claimants concerning extension for filing of evidence, 28 September 2006</p> <p><b>2.555</b> Memorandum on behalf of Wai 362 claimants concerning extension for filing of evidence, 29 September 2006</p> <p><b>2.556</b> Responses to the Crown's written questions (2.523) by Kathryn Rose, 28 September 2006</p> | <p><b>2.557</b> Responses to the Crown's written questions (2.526) by Marinus La Rooij, 29 September 2006</p> <p><b>2.558</b> Responses to the Crown's written questions (2.530) by Marinus La Rooij, 29 September 2006</p> <p><b>2.559</b> Amended week three hearing timetable, undated</p> <p><b>2.560</b> Memorandum on behalf of claimants concerning extension for filing of evidence, 2 October 2006</p> <p><b>2.561</b> Memorandum on behalf of Wai 362 claimants concerning amendment to evidence of Amy McLaughlin, 2 October 2006</p> <p><b>2.562</b> Memorandum on behalf of the Crown concerning extension for filing of evidence, 2 October 2006</p> <p><b>2.563</b> Direction concerning access to or use of Ngāti Motai and Ngāti Mahana oral history DVD, 4 October 2006</p> <p><b>2.564</b> Memorandum on behalf of Wai 162, Wai 210, Wai 637, and Wai 751 claimants concerning extension for filing David Alexander report, 4 October 2006</p> <p><b>2.565</b> Final timetable for week three hearing, undated</p> <p><b>2.566</b> Memorandum on behalf of Wai 255 and Wai 1340 claimants concerning filing amended map book, 3 October 2006</p> <p><b>2.567</b> Memorandum on behalf of Wai 454 and Wai 812 claimants concerning Wai 1226 evidence, 5 October 2006</p> <p><b>2.568</b> Memorandum on behalf of Wai 227, Wai 211, Wai 668, Wai 672, Wai 503, Wai 42(a), Wai 228, Wai 266, and Wai 540 claimants concerning Wai 1226, Wai 1340, and Wai 255 evidence, 5 October 2006</p> <p><b>2.569</b> Memorandum on behalf of Wai 1226 claimants concerning memorandum on behalf of Wai 454 and Wai 812 claimants, 5 October 2006</p> <p><b>2.570</b> Timetable for week four hearing, undated</p> |
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2.570—*continued*

(a) Amended timetable for week four hearing, undated

2.571 Memorandum on behalf of Wai 255 and Wai 1340 claimants concerning claimant evidence, 6 October 2006

2.572 Further amended week three hearing timetable, undated

2.573 Memorandum on behalf of Wai 1226 claimants concerning judicial conference, 9 October 2006

2.574 Direction concerning evidence filed for Wai 1226, Wai 255, and Wai 1340 claims, 9 October 2006

2.575 Direction concerning evidence filed for Wai 1340, Wai 255, and Wai 1226 claims, 10 October 2006

2.576 Memorandum on behalf of local authorities concerning supplementary evidence, 11 October 2006

2.577 Memorandum on behalf of the Crown concerning extension for filing of evidence, 16 October 2006

2.578 Direction concerning application for urgency, 18 October 2006

2.579 Memorandum on behalf of claimants concerning Ngāti Mōtai and Ngāti Mahana mana whenua report, 19 October 2006

2.580 Memorandum on behalf of Wai 1340, Wai 255, Wai 715, and Wai 854 claimants concerning request to defer week five hearing, 20 October 2006

2.581 Memorandum on behalf of Wai 342 and Wai 1061 claimants concerning hearing timetable for week five, 19 October 2006

2.582 Direction concerning filing dates for Trust Power evidence, 20 October 2006

2.583 Memorandum on behalf of Wai 342 claimants concerning hearing transcripts, 20 October 2006

2.584 memorandum on behalf of the Crown concerning extension for filing of evidence, 20 October 2006

2.585 Memorandum on behalf of Wai 1340 and Wai 255 claimants concerning evidence of Peter McBurney, 24 October 2006

2.586 Memorandum on behalf of Wai 1340 and Wai 255 claimants concerning amended report of Peter McBurney, 25 October 2006

2.587 Memorandum on behalf of Wai 854 and Wai 715 claimants concerning cross-examination of witnesses, 25 October 2006

2.588 Memorandum on behalf of Trust Power concerning Trust Power's interest in stage 2 inquiry, 25 October 2006

2.589 Direction concerning stage 2 inquiry hearing transcripts, 26 October 2006

2.590 Memorandum on behalf of claimants concerning Des Kahotea report, 26 October 2006

2.591 Memorandum on behalf of the Crown concerning David Alexander report, 27 October 2006

2.592 Memorandum on behalf of claimants concerning cross-examination in week four hearing, 27 October 2006

2.593 Memorandum on behalf of local authorities concerning cross-examination in week four hearing, 27 October 2006

2.594 Memorandum on behalf of Wai 162, Wai 210, Wai 637, and Wai 751 claimants concerning David Alexander report, 27 October 2006

2.595 Memorandum on behalf of Wai 1226 claimants concerning Ngāti Motai and Ngāti Mahana mana whenua report, 27 October 2006

2.596 Memorandum on behalf of Wai 342 claimants concerning admission of further evidence, 27 October 2006

2.597 Memorandum on behalf of Wai 650 and Wai 100 claimants concerning location of Waihou Forest, 1 November 2006

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- 2.598** Direction to register amended statement of claim for Wai 489, 6 November 2006
- 2.599** Direction to register amended statement of claim for Wai 947, 6 November 2006
- 2.600** Memorandum on behalf of Wai 947 claimants concerning stage 2 claims, 24 August 2006
- 2.601** Memorandum on behalf of the Crown with written questions for Michael Belgrave, Grant Young, Adam Heinz, and David Belgrave, 8 November 2006
- 2.602** Memorandum on behalf of the Crown concerning stage 2 hearing transcripts, 8 November 2006
- 2.603** Memorandum on behalf of Wai 162, Wai 210, Wai 637, and Wai 751 claimants with written response to claimant questions by David Alexander, 8 November 2006
- 2.604** Memorandum on behalf of Wai 162, Wai 210, Wai 637, and Wai 751 claimants with written questions for Michael Belgrave, 8 November 2006
- 2.605** Memorandum on behalf of Wai 162, Wai 210, Wai 637, and Wai 751 claimants with written questions for Mr Snelgrove, 8 November 2006
- 2.606** Memorandum on behalf of claimants concerning week five hearing venue, 10 November 2006
- 2.607** Memorandum on behalf of Wai 454 and Wai 812 claimants with written questions for Messrs Dell and Snelgrove, 10 November 2006
- 2.608** Memorandum on behalf of Wai 664 claimants concerning filing of evidence, 9 November 2006
- 2.609** Memorandum on behalf of local authorities with responses to written questions by Mr Snelgrove, 14 November 2006
- 2.610** Direction confirming venue for hearing closing arguments, 15 November 2006
- 2.611** Memorandum on behalf of claimants concerning amendments to the stage 2 statement of issues, 13 November 2006
- 2.612** Amended statement of issues for the stage 2 inquiry, undated
- 2.613** Memorandum on behalf of Wai 1226 claimants with written questions for Messrs Snelgrove and Dell, 13 November 2006
- 2.614** Memorandum on behalf of Wai 1328 claimants concerning extension for filing submissions, 17 November 2006
- 2.615** Memorandum of Michael Sharp concerning transcripts of evidence, 21 November 2006
- 2.616** Memorandum on behalf of local authorities concerning further information from cross-examination of Mr Snelgrove, 21 November 2006
- 2.617** Memorandum on behalf of Wai 489 claimants concerning extension for filing closing submissions, 23 November 2006
- 2.618** Memorandum on behalf of Wai 42(c) and Wai 255 claimants concerning extension for filing closing submissions, 23 November 2006
- 2.619** Memorandum on behalf of Wai 1226 claimants concerning extension for filing closing submissions, 23 November 2006
- 2.620** Memorandum on behalf of Wai 210, Wai 637, and Wai 751 claimants concerning extension for filing closing submissions, 24 November 2006
- 2.621** Memorandum on behalf of claimants concerning extension for filing closing submissions, 24 November 2006
- 2.622** Memorandum on behalf of Wai 664 claimants concerning extension for filing closing submissions, 24 November 2006
- 2.623** Memorandum on behalf of Wai 715 and Wai 854 claimants concerning filing closing submissions, 24 November 2006
- 2.624** Memorandum on behalf of Wai 211, Wai 668, and Wai 227 claimants concerning filing closing submissions, 24 November 2006
- 2.625** Memorandum on behalf of Wai 255 and Wai 1340 claimants concerning filing closing submissions, 24 November 2006



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- 2.626** Memorandum on behalf of Wai 100 and Wai 650 claimants seeking extension for filing closing submissions, 24 November 2006
- 2.627** Memorandum on behalf of Wai 162, Wai 210, Wai 637, and Wai 751 claimants concerning additional evidence promised to the Tribunal, 9 November 2006
- 2.628** Memorandum on behalf of the Crown with responses to written questions by Deputy Secretary of Te Puni Kokiri, 24 November 2006
- 2.629** Memorandum on behalf of the Crown with responses to written questions by Housing New Zealand Corporation, 27 November 2006
- 2.630** Memorandum on behalf of Wai 1226 claimants concerning extension for filing closing submissions, 1 December 2006
- 2.631** Memorandum on behalf of Wai 1355 and Wai 1328 claimants concerning extension for filing closing submissions, 4 December 2006
- 2.632** Direction to consolidate and register Wai 1355 claim, 18 October 2006
- 2.633** Memorandum on behalf of Wai 489 claimants concerning amended closing submissions, 6 December 2006
- 2.634** Memorandum on behalf of Wai 636 claimants concerning addendum to amended statement of claim, 6 December 2006
- 2.635** Memorandum on behalf of Wai 1061 claimants concerning addendum to statement of claim, 7 December 2006
- 2.636** Memorandum on behalf of Wai 342 claimants concerning addendum to statement of claim, 6 December 2006
- 2.637** Memorandum on behalf of the Crown with transcripts of evidence from stage 1 inquiry, 7 December 2006
- 2.638** Memorandum on behalf of the Crown concerning filing closing submissions, 8 December 2006
- 2.639** Memorandum on behalf of local authorities concerning extension for filing closing submissions, 8 December 2006
- 2.640** Timetable for week five hearing, undated  
(a) Final timetable for week five hearing, undated
- 2.641** Memorandum on behalf of the Crown concerning addition to closing submissions, 15 December 2006
- 2.642** Entry vacated
- 2.643** Direction to register amended statement of claim for Wai 342, 19 December 2006
- 2.644** Direction to register amended statement of claim for Wai 636, 19 December 2006
- 2.645** Direction to register amended statement of claim for Wai 1061, 19 December 2006
- 2.646** Direction amending final filing dates for stage 2 inquiry and setting supplementary questions for Housing New Zealand, 21 December 2006
- 2.647** Direction concerning request for confidentiality, 19 December 2006
- 2.648** Memorandum on behalf of the Crown concerning filing supplementary closing submissions, 12 February 2007
- 2.649** Memorandum on behalf of the Crown with responses to supplementary housing-related questions by Housing New Zealand Corporation and Te Puni Kokiri, 21 February 2007
- 2.650** Richard Boast, reply submissions concerning harbour, foreshore, and seabed issues at Tauranga, 7 March 2007
- 2.651** Reply submissions on behalf of Wai 1340 and Wai 255 claimants, 28 February 2007
- 2.652** Reply submissions on behalf of Wai 162, Wai 210, Wai 637, and Wai 751 claimants, 7 March 2007
- 2.653** Submissions on behalf of claimants in response to the Crown and local authorities' submissions on rating and urbanisation, 17 February 2007
- 2.654** Memorandum on behalf of Wai 1226 claimants concerning extension for filing reply submissions, 8 March 2007



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- 2.655** Reply submissions on behalf of Wai 100 and Wai 650 claimants, 12 March 2007
- 2.656** Reply submissions on behalf of Wai 664 claimants, 13 March 2007
- 2.657** Reply submissions on behalf of Wai 342 claimants, 28 March 2007
- 2.658** Reply submissions on behalf of Wai 636 and Wai 1061 claimants, 28 March 2007
- 2.659** Reply submissions on behalf of claimants concerning twentieth century land alienation, development, and administration (issue 2), 28 March 2007
- 2.660** Reply submissions on behalf of Wai 211, Wai 688, and Wai 227 claimants, 4 April 2007
- 2.661** Memorandum on behalf of Wai 1340 and Wai 255 claimants concerning submissions in reply filed by Wai 1226 claimants, 24 April 2007
- 2.662** Direction concerning submissions in reply filed by Wai 1226 claimants, 30 April 2007
- 2.663** Revised reply submissions on behalf of Wai 1226 claimants, 2 May 2007
- 2.664** Direction to register amended statement of claim for Wai 227, 28 May 2007
- 2.665** Memorandum on behalf of Wai 342 claimants concerning filing Fiona Hamilton report, 15 June 2007
- 2.666** Direction accepting misfiled evidence on the Tauranga Moana record of inquiry, 26 June 2007
- 2.667** Direction to register amended statement of claim to Wai 546, 28 August 2007
- 2.668** Direction concerning the use of a Local Government Rates Inquiry Panel report for stage 2 findings, 15 October 2007
- 2.669** Joint memorandum on behalf of Wai 854, Wai 715, Wai 254, Wai 1340, Wai 255, Wai 290, Wai 540, Wai 228, Wai 266, Wai 938, Wai 370, Wai 672, Wai 503, Wai 42(a), Wai 227, Wai 211, Wai 755, Wai 807, Wai 162, Wai 210, Wai 637, Wai 751, Wai 454, and Wai 812 claimants concerning direction of Tribunal, 25 October 2007
- 2.670** Memorandum on behalf of the Crown concerning direction of Tribunal, 29 October 2007
- 2.671** Direction concerning use of Local Government Commission review, 13 December 2007
- 2.672** Joint memorandum on behalf of Wai 162, Wai 210, Wai 637, Wai 751, and Wai 1703 claimants and the Crown concerning release of stage 2 report, 3 July 2009
- 2.673** Memorandum on behalf of Wai 1355 claimants concerning recent developments in the Wai 1355 claim, 25 June 2009
- 2.674** Direction requesting submissions concerning developments in respect of the Wai 1355 claim, 1 July 2009
- 2.675** Memorandum on behalf of Tauranga City Council concerning direction of Tribunal, 7 July 2009
- 2.676** Memorandum on behalf of the Crown concerning direction of Tribunal, 7 July 2009
- 2.677** Memorandum on behalf of Wai 1355 claimants responding to Tauranga City Council and Crown memoranda, 7 July 2007
- 2.678** Direction adjourning Kakau whānau application for early report and interim recommendations, 9 July 2009
- 2.679** Memorandum on behalf of Wai 717 claimants concerning transfer of evidence, 11 February 2010
- 2.680** Direction concerning transfer of evidence, 12 February 2010
- 3. STAGE 2 RESEARCH COMMISSIONS**
- 3.100** Direction commissioning Leanne Boulton to prepare research report, 8 June 2006
- 3.101** Direction commissioning James Mitchell to prepare research report, 8 June 2006
- 3.102** Direction commissioning Wendy Hart to prepare research report, 8 June 2006

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- 3.103** Direction commissioning Leanne Boulton to prepare research report, 8 June 2006
- 3.104** Direction cancelling research commission of Leanne Boulton, 28 July 2006
- 3.105** Direction commissioning Kenneth Palmer to prepare research report, 28 July 2006
- 3.106** Direction commissioning Antoine Coffin to prepare research report, 28 July 2006
- 3.107** Direction commissioning Michael Belgrave, Grant Young, and Adam Heinz to prepare research report, 28 July 2006
- 3.108** Direction commissioning Morehu McDonald to prepare research report, 28 July 2006
- 3.109** Direction commissioning Leanne Boulton and James Mitchell to prepare research report, 28 July 2006
- 3.110** Direction commissioning Richard Boast to prepare legal submission, 4 August 2006
- 3.111** Direction releasing research report of James Mitchell, 1 September 2006
- 3.112** Direction releasing research report of Wendy Hart, 1 September 2006
- 3.113** Direction releasing research report of Leanne Boulton, 1 September 2006
- 3.114** Direction releasing research report of Kenneth Palmer, 1 September 2006
- 3.115** Direction releasing research report of Morehu McDonald, 1 September 2006
- 3.116** Direction releasing research report of Leanne Boulton and James Mitchell, 19 September 2006
- 3.117** Direction releasing research report of Antoine Coffin, 19 September 2006
- 3.118** Direction releasing research report of Michael Belgrave, Grant Young, and Adam Heinz, 20 October 2006

- 3.119** Direction releasing final version of research report of Michael Belgrave, Grant Young, and Adam Heinz, 23 November 2006

**4. STAGE 2 TRANSCRIPTS AND TRANSLATIONS**

- 4.2** Transcript of stage 2 first hearing, 29–31 May to 1–2 June 2006
- 4.3** Transcript of stage 2 second hearing, 3–7 July 2006
- 4.4** Transcript of stage 2 third hearing, 9–13 October 2006
- 4.5** Transcript of stage 2 fourth hearing, 30–31 October to 1–3 November 2006
- 4.6** Transcript of stage 2 fourth hearing, 30–31 October to 1–3 November 2006
- 4.7** Transcript of stage 2 fourth hearing, 30–31 October to 1–3 November 2006
- 4.8** Second transcript of stage 2 first hearing, 29–31 May to 1–2 June 2006
- 4.9** Second transcript of stage 2 second hearing, 3–7 July 2006

**RECORD OF DOCUMENTS**

The documents from A2 to P14 are those documents from stage 1 that are cited in this report. From document Q1 on is a full record of the stage 2 documents.

Any documents marked with an asterisk are confidential and unavailable to the public without a Tribunal order.

**A. DOCUMENTS RECEIVED PRIOR TO STAGE 1 FIRST HEARING**

**A2** Evelyn Stokes, *‘Te Raupatu o Tauranga Moana: The Confiscation of Tauranga Lands’*, 2 vols (commissioned research report, Wellington: Waitangi Tribunal, 1990), vol 1

**A7** Suzanne Woodley, *Tuhua (Mayor Island)* Research Series (Wellington: Waitangi Tribunal, 1993)

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(a) Supporting documents to document A7, various dates

**A8** Suzanne Woodley, *Matakana Island*, Research Series (Wellington: Waitangi Tribunal, 1993)

**A9** Anita Miles, *Kopukairoa: Tauranga Telecom Site*, Research Series (Wellington: Waitangi Tribunal, 1993)

**A10** McCaw, Lewis and Chapman, 'Final Report on Mt Maunganui Peninsula', 2 vols, report prepared on behalf of Wai 211 claimants, December 1992, vol 1

(a) Supporting documents to document A10, various dates

(b) Supporting documents to document A10, various dates

(c) Supporting documents to document A10, various dates

(d) Supporting documents to document A10, various dates

**A11** Evelyn Stokes, *Ngamanawa: A Study of Conflicts in the Use of Forest Land* (Hamilton: University of Waikato, 1983)

**A14** Richard Boast, 'Te Whanganui-a-Orotu (Napier Inner Harbour) 1851–1991: A Legal History' (commissioned research report, Wellington: Waitangi Tribunal, 1991)

**A15** Evelyn Stokes, 'Tauranga Moana: A Study of the Impact of Urban Growth on Rural Maori Communities', Occasional Paper no 7, June 1980

**A16** Des Tatana Kahotea, 'Western Bay of Plenty Urban Development Strategy Study, Technical Report 8: Taha Maori: Maori Perspectives', report prepared for the Town and Country Planning Directorate, May 1986

**A17** Des Tatana Kahotea, 'Tauranga Urban Growth Strategy Cultural Resource Inventory: Features of Significance to the Maori Community (Tangata Whenua)', June 1992

**A18** Evelyn Stokes, 'Te Raupatu o Tauranga Moana', 2 vols (commissioned research report, Wellington: Waitangi Tribunal, 1993), vol 2

**A19** Heather Bassett, 'Otawa Scenic Reserve' (commissioned research report, Wellington: Waitangi Tribunal, 1996)

**A20** Beca Steven, 'Western Bay of Plenty Sewerage: Water Right Study of Bay of Plenty Ocean Foreshore Waters', study report prepared for Bruce Henderson Consultants Ltd, June 1991

**A22** Vincent O'Malley, 'The Aftermath of the Tauranga Raupatu, 1864–1981' (commissioned research report, Wellington: Crown Forestry Rental Trust, 1995)

(a) Supporting documents to document A22, various dates

(b) Supporting documents to document A22, various dates

(c) Supporting documents to document A22, various dates

**A23** Hazel Riseborough, 'The Crown and Tauranga Moana, 1864–1868' (commissioned research report, Wellington: Crown Forestry Rental Trust, 1994)

**A25** Environment Bay of Plenty, *Tauranga Harbour Regional Plan: Environmental Investigations, Water and Sediment Quality of Tauranga Harbour* (Whakatane: Environment Bay of Plenty, 1994)

**A26** Heather Bassett, 'Aspects of the Urbanisation of Maungatapu and Hairini, Tauranga' (commissioned research report, Wellington: Waitangi Tribunal, 1996)

(a) Supporting documents to document A26, various dates

**A27** Kere Cookson-Ua, 'Te Awa-o-Tukorako and Whareroa Blocks' (commissioned research report, Wellington: Waitangi Tribunal, 1996)

**A28** Antoine Coffin, 'Wairoa River and Coastal Environment Issues and Options Paper', October 1995

**A31** Tony Nightingale, 'Tauranga Land Development Schemes, 1929–55' (commissioned research report, Wellington: Waitangi Tribunal, 1996)

(a) Supporting documents to document A31, various dates

**A32** Rachel Willan, 'Land Taken for Waterworks' (commissioned research report, Wellington: Waitangi Tribunal, undated)

(a) Supporting documents to document A32, various dates

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- A33** Rachel Willan, 'Wairoa River Report' (commissioned research report, Wellington: Waitangi Tribunal, 1996)  
(a) Supporting documents to document A33, various dates
- A34** Jonathan Easthope, 'Research Report: Public Works Acquisitions in Poike Block: Wai 362 – a case study for the Tauranga Claims Wai 215' (commissioned research report, Wellington: Waitangi Tribunal, undated)  
(a) Supporting documents to document A34, various dates
- A35** Rachel Willan, 'Hydro-electricity in the Wairoa River Catchment: Land Acquisition' (commissioned research report, Wellington: Waitangi Tribunal, 1996)  
(a) Supporting documents to document A35, various dates
- A36** Giselle Byrnes, 'A Preliminary Report on the Use, Control and Management of the Tauranga Harbour' (commissioned research report, Wellington: Waitangi Tribunal, undated)
- A37**  
(a) Des Tatana Kahotea, 'Ngati Kahu, Ngati Pango, Ngati Rangi', 2 vols (commissioned research report, Wellington: Waitangi Tribunal, 1996), vol 1  
(b) Antoine Coffin, 'Ngati Kahu, Ngati Rangi, Ngati Pango, Wai 42a', 2 vols (commissioned research report, Wellington: Waitangi Tribunal, 1996), vol 2
- A38** Kathryn Rose, 'The Impact of Confiscation: Socio-economic Conditions of Tauranga Maori, 1865–1965' (commissioned research report, Wellington: Crown Forestry Rental Trust, 1997)  
(a) Supporting documents to document A38, various dates  
(b) Supporting documents to document A38, various dates  
(c) Supporting documents to document A38, various dates  
(d) Supporting documents to document A38, various dates  
(e) Supporting documents to document A38, various dates  
(f) Summary of document A38, undated
- A39** Tony Nightingale, 'Tauranga Moana: A Social and Economic Impact Report, 1865–1960' (commissioned research report, Wellington: Crown Forestry Rental Trust, 1996)  
(a) Supporting documents to document A39, various dates
- A41** Tony Nightingale, 'Re-housing Tauranga Maori, 1935–72' (commissioned research report, Wellington: Waitangi Tribunal, 1996)  
(a) Supporting documents to document A41, various dates
- A44** Heather Bassett, 'Mangatawa' (commissioned research report, Wellington: Waitangi Tribunal, 1996)
- A45** Heather Bassett and Richard Kay, 'Huharua, Pukewhanake and Nga Kuri a Whare' (commissioned research report, Wellington: Waitangi Tribunal, 1996)
- A46** Heather Bassett and Richard Kay, 'Otawhiwhi Reserve and Bowentown Domain' (commissioned research report, Wellington: Waitangi Tribunal, 1996)
- A48** Roimata Minhinnick, 'The Alienation of Moturiki, Motuotau and Karewa Islands' (commissioned research report, Wellington: Waitangi Tribunal, undated)
- A50** Anthony Fisher, Keni Piahana, Te Awanuiarangi Black, and Rahera Ohia, 'The Issues Concerning the Use, Control and Management of Tauranga Harbour and its Estuaries' (commissioned research report, Wellington: Waitangi Tribunal, 1997)
- A51** Heather Bassett and Richard Kay, 'Case Studies of Crown Administration in Welcome Bay: A Report on the Papakanui Trust Claim' (commissioned research report, Wellington: Waitangi Tribunal, 1997)  
(a) Supporting documents to document A51, various dates
- A52** Rachel Willan, 'Papamoa School Site' (commissioned research report, Wellington: Waitangi Tribunal, 1997)  
(a) Supporting documents to document A52, various dates
- A57** Evelyn Stokes, 'The Allocation of Reserves for Maori in the Tauranga Confiscated Lands', 2 vols (commissioned research report, Wellington: Waitangi Tribunal, 1997), vol 1

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(a) Evelyn Stokes, 'The Allocation of Reserves for Maori in the Tauranga Confiscated Lands', 2 vols (commissioned research report, Wellington: Waitangi Tribunal, 1997), vol 2

(b) Summary of reports on the Tauranga confiscated lands, undated

(c) Supporting documents to document A57(a), various dates

A67 Taiawa Kuka, brief of evidence, 23 February 1998

A76 Antoine Coffin, 'Changes in a Maori Community: Wairoa River Hapu of Tauranga' (commissioned research report, Wellington: Waitangi Tribunal, 1997)

(a) Supporting documents to document A76, various dates

A77 Roimata Minhinnick, 'The Ownership of Tauranga Moana' (commissioned research report, Wellington: Waitangi Tribunal, undated)

**B. DOCUMENTS RECEIVED TO END OF STAGE 1 FIRST HEARING**

B4 Robert A McClean, 'Matakana Island Sewerage Outfall Report: Volume One and Two: Main Report and Appendix' (commissioned research report, Wellington: Waitangi Tribunal, 1998)

(a) Supporting documents to document B4, various dates

B6 Mark Anthony Nicholas, brief of evidence, 19 May 1998

B11 Trudy Ake, brief of evidence, undated

B16 Iwi report on Tauranga district strategic plan, undated

**C. DOCUMENTS RECEIVED TO END OF STAGE 1 SECOND HEARING**

C1 Heather Bassett and Richard Kay, 'Ngaiterangi and the Crown' (commissioned research report, Wellington: Waitangi Tribunal, 1998)

C13 Summary of document A37(a), undated

(a) Des Tatana Kahotea, 'Poripori, Ngati Pango', November 1998

(b) Des Tatana Kahotea, 'Parish of Te Puna Lot 182, Ngati Pango', November 1998

(c) Des Tatana Kahotea, 'Alienations of Te Ongaonga No 1 and Ruakaka Blocks, Ngati Kahu, Ngati Kirihihi', November 1998

C17 Stephen Gates, brief of evidence, 13 November 1998

C20 Ngaronoa Ngata, brief of evidence, undated

C22 Delwyn Bennett-Howe, brief of evidence, 13 November 1998

(a) Supporting documents to document C22, various dates

**D. DOCUMENTS RECEIVED TO END OF STAGE 1 THIRD HEARING**

D1 Anne Salmond, brief of evidence for *Ngati Kahu v Tauranga District Council*, Planning Tribunal, RMA 519/93, undated

D2 Heather Bassett and Richard Kay, 'Ngati Pukenga and Ngapeke Block' (commissioned research report, Wellington: Waitangi Tribunal, 1998)

D5 Roimata Minhinnick, 'A Report Commissioned by the Waitangi Tribunal for the Wai 627 Claim' (commissioned research report, Wellington: Waitangi Tribunal, 1999)

(a) Supporting documents to document D5, various dates

D7 Robert McLean, 'Tauranga Moana Fisheries, Reclamations, and Foreshores' (commissioned research report, Wellington: Waitangi Tribunal, 1999)

(a) Supporting documents to document D7, various dates

(b) Supporting documents to document D7, various dates

D9 Karora Te Mete, brief of evidence, undated

D10 James Tapiata, brief of evidence, undated

D13 Arapera Nuku, brief of evidence, undated  
(a) English translation of document D13, undated

D17 Angela Bennett, brief of evidence, undated

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**D19** Homai Balzer, brief of evidence, undated

**D25** Mere Balzer, 'Nga Tatai Korero o Ngati Hangarau' (commissioned research report, Wellington: Waitangi Tribunal, 1999)

**D31** Michael O'Brien, brief of evidence, undated  
(a) Summary of evidence concerning Ngamanawa Incorporation, undated

**D32** Huia Harnett, brief of evidence, undated

**D35** Janis Smith, brief of evidence, undated

**E. DOCUMENTS RECEIVED TO END OF STAGE 1 FOURTH HEARING**

**E1** Heather Bassett and Richard Kay, 'Crown Acquisition and Desecration of Nga Potiki Land' (commissioned research report, Wellington: Waitangi Tribunal, 1999)

- (a) Summary of document E1, June 1999
- (b) Supporting documents to document E1, various dates

**E3** Kiakino Paraire, brief of evidence, undated

**E4** Ngahuia Dixon, brief of evidence, undated

**E5** Haare Williams, brief of evidence, undated  
(a) Tauranga pollution evidence (CD and VHS), undated  
(b) Transcription of document E5(a), undated

**E6** Hoani Farrell, brief of evidence, undated  
(a) English translation of document E6, undated

**E8** Rapata Wepiha, brief of evidence, undated

**E9** Maaka Harawira, brief of evidence, undated

**E10** Wiparera TeKani, brief of evidence, undated  
(a) Māori translation of document E10, undated

**E13** Parewaitai Reeder, brief of evidence, undated

**E14** Te Aohuakirangi Woodhouse, brief of evidence, undated

**E16** Sydney Rameka, brief of evidence, undated

**E17** Andrew Kiwi, brief of evidence, undated

**E18** Desmond Tatana Kahotea, brief of evidence, undated

(a) Supporting documents to document E18, various dates

(b) Supporting documents to document E18, various dates

**E19** Paula Werohia-Lloyd, brief of evidence, undated

**E20** Poihaere Walker, brief of evidence, undated

**E25** Colin Reeder, brief of evidence, undated

**E26** Peata McLeod, brief of evidence, undated

**E27** Morro River Peters, brief of evidence, undated

(a) English translation of document E27, undated

**E28** Keremeta Kiwi Rameka, brief of evidence, undated

(a) Māori translation of document E28

**E34** Documents in relation to Mangatawa, undated

**F. DOCUMENTS RECEIVED TO END OF STAGE 1 FIFTH HEARING**

**F1** Evaan Aramakutu, 'The Compulsory Acquisition of Uneconomic Rangiwaia Island Interests by the Maori Trustee' (commissioned research report, Wellington: Waitangi Tribunal, 1999)

**F2** Marinus La Rooij, 'Wairoa Hapu and the Realignment of State Highway 2: Wairoa–Tauranga' (commissioned research report, Wellington: Waitangi Tribunal, 1999)  
(a) Supporting documents to document F2, various dates  
(b) Revised edition of document F2, September 1999

**F3** Hazel Riseborough, 'Ngai Tamarawaho: "Protectors of the Prophecy"' (commissioned research report, Wellington: Crown Forestry Rental Trust, 1999)

- (a) Summary of document F3, undated
- (b) Supporting documents to document F3, various dates



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**F12** Summary of document A60, undated  
(a) Supporting documents to document F12, various dates

**F16** Dave Matthews, brief of evidence, undated

**F17** Morehu Rahipere, brief of evidence, undated

**F20** Desmond Matakokiri Tata, brief of evidence, undated

**F21** Waiora Nuku, brief of evidence, undated  
(a) Maori translation of document F21, undated

**F22** Te Hoori Rikirangi, brief of evidence, undated

**F23** Takuwai Mason, brief of evidence, undated  
(a) Māori translation of document F23, undated

**F29** Rachel Willan, 'From County to Town: A Study of Public Works and Urban Encroachment in Matapihi, Whareroa and Mount Maunganui' (commissioned research report, Wellington: Waitangi Tribunal, 1999)  
(a) Supporting documents to document F29, various dates

**F32** The Huria Accord, 4 November 1988  
(a) Draft agreement between Ngāi Tamarawaho and Tauranga District Council, undated

**F34** Parihaka Kohu-Fry, brief of evidence, undated

## **G. DOCUMENTS RECEIVED TO END OF STAGE 1 SIXTH HEARING**

**G1** Fiona Hamilton, 'Ngai Te Ahi Historical Report' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2000)  
(a) Summary of document G1, undated  
(b) Supporting documents to document G1, various dates  
(c) Supporting documents to document G1, various dates

**G2** Tiraroa Reweti, 'Ngai Te Ahi Social Impact Report' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2000)  
(a) Summary of document G2, undated  
(b) Transcripts, undated

**G6** Joseph Te Poroa Malcolm, brief of evidence, undated

**G12** Iria Whiu, brief of evidence, undated

**G16** Rikirau Luttenberger, brief of evidence, undated  
(a) Māori translation of document G16, undated

**G17** Kapuhua Reweti, brief of evidence, undated  
(a) Supporting documents to document G17, various dates

**G23** Ronald Te Pio Kawe, brief of evidence, undated

**G24** Desmond Parekura Heke Kaiawha, brief of evidence, undated  
(a) Supporting documents to document G24, various dates  
(b) Supporting documents to document G24, various dates

**G26** Keni Piahana, brief of evidence, undated

**G27** Te Aroha Luttenberger, brief of evidence, undated  
(a) Supporting documents to document G27, various dates

## **H. DOCUMENTS RECEIVED TO END OF STAGE 1 SEVENTH HEARING**

**H4** Puhirake Ihaka, brief of evidence, undated  
(a) Extract from A Hope Blake, *Sixty Years in New Zealand: Stories of Peace and War* (Wellington: Gordon and Gotch, 1909)  
(b) Clarification summary, undated  
(c) Supporting documents to document H4, various dates

**H6** Tureiti Ihaka Stockman, brief of evidence, undated

## **I. DOCUMENTS RECEIVED TO END OF STAGE 1 EIGHTH HEARING**

**I1** Nicola Blackburn, 'Further Nga Potiki Land Alienation and Public Works Takings' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2000)  
(a) Supporting documents to document I1, various dates



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**I1**—*continued*

(b) Summary of document I1, undated

**I4** Tahi McLeod, brief of evidence, undated

**I6** Te Rehina Walker, brief of evidence, undated

**I22** Tai Taikato, brief of evidence, undated

(a) Supporting document to document I22, undated

**J. DOCUMENTS RECEIVED TO END OF  
STAGE 1 NINTH HEARING**

**J1** Richard Boast, 'Confiscation and Regrant: Matakana, Rangiwaia, Motiti and Tuhua: Raupatu and related issues' (commissioned research report, Wellington: Waitangi Tribunal, 2000)

**J2** Fiona Hamilton, 'Ngati He Historical Report: the Nineteenth Century' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2000)

(a) Supporting documents to document J2, various dates

(b) Entry vacated

(c) Fiona Hamilton, 'Ngati He Historical Report 1950s to 1980s', final draft, October 2004

**J11** Waraki Paki, brief of evidence, undated

**J14** Anthony Fisher, brief of evidence, undated

**J20** Hauata Palmer, brief of evidence, undated

**J21** Taiawa Kuka on behalf of the Matakana Island claimants, brief of evidence, undated

**J22** Heeni Murray, brief of evidence, undated

**J28** Tai Taikato, brief of evidence, undated

**J31** Tane Kaiawha, brief of evidence, undated

(a) Supporting documents to document J31, various dates

**J43** Transcript of evidence of Douglas Sutton, undated

**K. DOCUMENTS RECEIVED TO END OF  
STAGE 1 TENTH HEARING**

**K25** Mary Gillingham, 'Waitaha and the Crown, 1864–1981' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2001)

(a) Supporting documents to document K25, various dates

**L. DOCUMENTS RECEIVED TO END OF  
STAGE 1 ELEVENTH HEARING**

**L2** Grant Young, 'The Alienation by Sale of the Hapu Estate of Ngati He at Tauranga Moana: Volume One: the Nineteenth Century', 2 vols (commissioned research report, Wellington: Waitangi Tribunal, 2001), vol 1

(a) Supporting documents to document L2, various dates

**L11** Te Inaiti Tamihana, brief of evidence, undated

**M. DOCUMENTS RECEIVED TO END OF  
STAGE 1 TWELFTH HEARING**

**M1** International Research Institute for Māori and Indigenous Education, 'Socio-economic Impact Report for Nga Potiki' (commissioned research report, Wellington: Crown Forestry Rental Trust, undated)

**M3** Grant Young, 'The Alienation by Sale of the Hapu Estate of Ngati He at Tauranga Moana: Volume Two: the Twentieth Century', 2 vols (commissioned research report, Wellington: Waitangi Tribunal, 2001), vol 2

**M4** Delwyn Little, Aroha Ririnui, transcripts of Ngāti Hē interviews, 2000–2001

**N. DOCUMENTS RECEIVED TO END OF  
STAGE 1 THIRTEENTH HEARING**

**N2** Tony Walzl, 'Ngati Ruahine: Land Issues Overview, 1900–2000' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2001)

(a) Supporting documents to document N2, various dates

**N23** Closing submissions on behalf of Wai 659 claimants, undated

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**P. DOCUMENTS RECEIVED TO END OF  
STAGE 1 FIFTEENTH HEARING**

**P14** Marinus La Rooij, “‘That Most Difficult and Thorny Question’: The Rating of Maori Land in Tauranga County’ (commissioned research report, Wellington: Waitangi Tribunal, 2002)

**Q18** Rehua Smallman, brief of evidence, 22 May 2006

**Q19** Whaitiri Williams, brief of evidence, 22 May 2006

**Q20** Rahera Ohia, brief of evidence, 22 May 2006

**Q. DOCUMENTS RECEIVED TO END OF  
STAGE 2 FIRST HEARING**

**Q1** James Francis Rolleston, brief of evidence, 19 May 2006

**Q21** Entry vacated

**Q22** Rereamomo Monty Ohia, brief of evidence, 22 May 2006

**Q2** Jackson Ropiha White, brief of evidence, 22 May 2006

**Q23** Shane Ashby, brief of evidence, 22 May 2006

**(a)** Jackson Ropiha White, amended brief of evidence, 26 May 2006

**Q24** Te Keepa Smallman, brief of evidence, 22 May 2006

**(a)** Answers to Crown questions by Te Keepa Smallman, 28 July 2006

**Q3** Riria Murray, brief of evidence, 17 May 2006

**Q4** Stephen Andrew Waaka, brief of evidence, 8 May 2006

**Q25** Pikowai Ohia, brief of evidence, 22 May 2006

**Q5** Lance Hori Waaka, brief of evidence, 22 May 2006

**Q26** Putiputi Dey, brief of evidence, 22 May 2006

**Q6** Kingi Kino Ranui, brief of evidence, 22 May 2006

**Q27** Hone William Newman, brief of evidence, 22 May 2006

**Q7** Gordon Te Reo Hau Ranui, brief of evidence, 22 May 2006

**Q28** Wiremu Haora, brief of evidence, 22 May 2006

**Q8** William John Ranui Signall, brief of evidence, 22 May 2006

**Q29** Desmond Parekura Heke Kaiawha, brief of evidence, undated

**Q9** Mahaki Ellis, brief of evidence, undated

**Q30** Tai Taikato, brief of evidence, undated

**Q10** Riri Ellis, brief of evidence, undated

**Q31** Parengamihi Gardiner, brief of evidence, undated

**Q11** Carlo Ellis, brief of evidence, undated

**Q32** Hinerongo Taikato Walker, brief of evidence, undated

**Q12** Matiu Dickson, brief of evidence, undated

**Q33** Ngaputiputi Taniora Pukekura, brief of evidence, undated

**Q13** Kihi Ngatai, brief of evidence, undated

**Q14** Hori Paki Ross, brief of evidence, undated

**Q34** Awanuiarangi Black, brief of evidence, undated

**Q15** Oketopa Pukekura, brief of evidence, 23 May 2006

**Q35** Antoine Coffin, brief of evidence, 23 May 2006

**Q16** Ron Hapi, brief of evidence, 23 May 2006

**Q36** Linda Grey, brief of evidence, 23 May 2006

**Q17** Te Awanuiarangi Black, brief of evidence, 22 May 2006

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**Q36**—*continued*

(a) Linda Grey, amended brief of evidence, 23 May 2006

**Q37** Ngāti Pūkenga document bank, undated

**Q38** Powerpoint presentation of Des Parekura Heke Kaiawha, 26 May 2006

**Q39** Counsel, submissions concerning rating and urbanisation, 26 May 2006

**Q40** Counsel for Wai 854 and Wai 715, opening statement, 26 May 2006

**Q41** Counsel for Wai 210, Wai 637, and Wai 751, opening submissions, 26 May 2006

**Q42** Counsel for Wai 162, opening submissions, 26 May 2006

**Q43** Counsel, opening submissions concerning land alienation, development, and administration (issue 2), 29 May 2006

**Q44** Counsel for Wai 342, opening submissions, 29 May 2006

**Q45** Toa Haere Faulkner, brief of evidence, 29 May 2006

**Q46** James Tapiata, brief of evidence, 25 May 2006

**Q47** Te Karehana Wicks, brief of evidence, 25 May 2006

**Q48** Taiawa Kuka, brief of evidence, 25 May 2006

**Q49** Albert Puhirake Ihaka, brief of evidence, undated

**Q50** Counsel, submissions concerning Public Works Act takings in the Tauranga Moana inquiry district, 1 June 2006

**Q51** Rapata Wepiha, brief of evidence, undated  
(a) Assorted photographs

**Q52** Powerpoint presentation – colour maps for Des Parekura Heke Kaiawha, undated

**R. DOCUMENTS RECEIVED TO END OF  
STAGE 2 SECOND HEARING**

**R1** Neil Te Kani, brief of evidence, undated

**R2** Site visit at Whareroa Marae by Kihi Ngatai, undated

**R3** Anthony Fisher, brief of evidence, undated

**R4** Te Maumako August, brief of evidence, undated

**R5** Te Whakaotinga Louis Te Kani, brief of evidence, undated

**R6** John Gordon Neverman, brief of evidence, undated

(a) John Gordon Neverman, amended brief of evidence, undated

**R7** Penetaka Bryan Dickson, brief of evidence, undated

**R8** Eddie Tiepa Bluegum, brief of evidence, 26 June 2006

**R9** Beverley Anne Perori Flavell, brief of evidence, 18 June 2006

**R10** James Francis Rolleston, brief of evidence, 19 June 2006

**R11** Tiraroa Te Ahiri Toma, brief of evidence, 19 April 2006

**R12** Busby Alan Puhipi Murray, brief of evidence, 17 June 2006

**R13** John Kira Toma, brief of evidence, 19 June 2006

**R14** Hinerangi Purewa (née McLeod), brief of evidence, 22 June 2006

**R15** Whitiora Rangimarie McLeod, brief of evidence, 22 June 2006

**R16** Ngahiraka McLeod, brief of evidence, 22 June 2006

(a) Ngahiraka McLeod, amended brief of evidence, 29 June 2006

**R17** Te Whetu McLeod, brief of evidence, 22 June 2006

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- (a) Te Whetu McLeod, amended brief of evidence, 29 June 2006
- R18** Huriana McLeod Taite, brief of evidence, 22 June 2006
- R19** Mawete Molly Gardiner, brief of evidence, undated
- R20** Reon Roger Tuanau, brief of evidence, 26 June 2006
- R21** Huikakahu Kawe, brief of evidence, 26 June 2006
- R22** Tawharangi Anthony Nuku, brief of evidence, 26 June 2006
- R23** Antoine Coffin, brief of evidence, 26 June 2006  
(a) Antoine Coffin, amended brief of evidence, 26 June 2006
- R24** Paul Stanley, brief of evidence, 26 June 2006
- R25** Te Karehana Wicks, brief of evidence, 26 June 2006  
(a) Te Karehana Wicks, amended brief of evidence, 6 July 2006
- R26** Brian Dickson, brief of evidence, 26 June 2006
- R27** Pine McLeod, brief of evidence, 26 June 2006  
(a) Pine McLeod, amended brief of evidence, 4 July 2006
- R28** Robyn Hinenui Cooper, brief of evidence, 26 June 2006
- R29** Joe Kee, brief of evidence, 26 June 2006
- R30** Colin Reeder, brief of evidence, 26 June 2006
- R31** Colin Reeder – land banking, brief of evidence, 26 June 2006
- R32** Anthony Ivan Paraire, brief of evidence, 26 June 2006
- R33** Neil Te Kani, brief of evidence, undated
- R34** Desmond Parekura Heke Kaiawha, brief of evidence, 26 June 2006  
(a) Desmond Parekura Heke Kaiawha, amended brief of evidence, 3 July 2006
- R35** Andrew Augustine Walker, brief of evidence, 26 June 2006
- R36** Cliffe Adams, brief of evidence, 26 June 2006
- R37** John Ohia and Orewa Barrett-Ohia, brief of evidence, 26 June 2006
- R38** Rahera Ohia, brief of evidence, 26 June 2006
- R39** Rawinia Haua, brief of evidence, 26 June 2006  
(a) Rawinia Haua, amended brief of evidence, 27 June 2006
- R40** Te Aohuakirangi Woodhouse, brief of evidence, 26 June 2006
- R41** Tirikawa Ohia, brief of evidence, 26 June 2006
- R42** Hone William Newman, brief of evidence, 26 June 2006
- R43** Rehua Smallman, brief of evidence, 26 June 2006
- R44** Rina Te Rehina Walker, brief of evidence, 27 June 2006
- R45** Te Awanuiarangi Black, brief of evidence, 28 June 2006
- R46** Reweti Te Mete, brief of evidence, 30 June 2006  
(a) English translation of document R46  
(b) Associated PowerPoint presentation
- R47** Jason Conan Murray, brief of evidence, 17 June 2006
- R48** Maps: Tauranga City Council District Plan zones and district boundary, 30 June 2006
- R49** Marama Hikatangata Furlong, brief of evidence, 30 June 2006

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**R50** Gerard Gardiner, brief of evidence, 27 June 2006

**R51** Ngāi Tukairangi hapū photo booklet, 30 June 2006

**R52** Ngāti Pūkenga map book, 3 July 2006

**R53** Ngāi Te Rangi iwi map book (CD), 1 July 2006

**R54** Miria Ada Tukaki, brief of evidence, undated

**R55** A S Carlyle, brief of evidence, undated

**R56** Counsel for Wai 636 and Wai 1061, opening submissions, 3 July 2006

**R57** Document bank for document R56, 3 July 2006

**R58** Toa Haere Faulkner, brief of evidence, undated

**R59** Kiwi Molly McLeod, brief of evidence, 22 June 2006

**R60** Counsel for Wai 342, opening submissions: week two evidence, 4 July 2006

**R61** Counsel, opening submissions concerning environmental issues relating to water and cultural heritage, 4 July 2006

**R62** Iria Friconnet Stokes, brief of evidence, undated

**R63** Eddie Ngatai, brief of evidence, undated

**R64** Counsel, opening submissions concerning environmental issues, 4 July 2006

**R65** Te Pio Kawe, brief of evidence, 3 July 2006  
(a) Memorandum of counsel on behalf of Te Pio Kawe, with attachments, 2 August 2006

**R66** Frank Te Werahiko Harawira, brief of evidence, 5 July 2006

**R67** Te Hau Tutua, brief of evidence, undated

**R68** Entry vacated

**R69** Nessie Hinetai Te Kuka, brief of evidence, undated

**R70** Aroha Ririnui, brief of evidence, 7 July 2006

**S. DOCUMENTS RECEIVED TO END OF  
STAGE 2 THIRD HEARING**

**S1** Morehu McDonald, 'Ngati Hinerangi Grievances Relating to the Building of the Kaimai Tunnel and Deviation' (commissioned research report, Wellington: Waitangi Tribunal, 2006)

(a) Amended report of document s2, October 2006

**S2** Wendy Hart, 'A Comparative Study of Public Works Takings in the Tauranga Moana Inquiry District' (commissioned research report, Wellington: Waitangi Tribunal, 2006)

(a) Summary of document s2, September 2006

(b) Supporting documents for document s2, various dates

**S3** Jamie Mitchell, 'Report on Unresolved Land and Resource Issues for the Tauranga District Inquiry' (commissioned research report, Wellington: Waitangi Tribunal, 2006)

(a) Supporting documents for document s3, various dates

**S4** Kenneth Palmer, 'Legislation Governing Town and Country Planning in Tauranga Moana, 1953–1990', August 2006

(a) 'Comment on Rating and Valuation of Maori Land', additional report by Kenneth Palmer, 8 November 2006

**S5** Leanne Boulton, 'A Socio-demographic and Economic Profile of Maori in the Tauranga Inquiry District 2001' (commissioned research report, Wellington: Waitangi Tribunal, 2006)

(a) Summary of document s5, 2 October 2006

**S6** Leanne Boulton, 'Town and Country Planning and Its Impact on Tauranga Maori Communities, c 1953–1990: A Summary and Analysis of the Existing Research' (commissioned research report, Wellington: Waitangi Tribunal, 2006)

(a) Summary of document s6, undated

(b) Powerpoint presentation of maps

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- s7** Antoine Coffin, 'A Study of Environmental Planning in Tauranga Moana since 1991', report prepared for Corban Revell and the Waitangi Tribunal, September 2006  
(a) Index of supporting documents to document s7
- s8** James Timothy Clair, brief of evidence, 25 September 2006
- s9** Henare (Henry) Hohepa Te Mete (Smith), brief of evidence, 25 September 2006
- s10** Grant Thompson, brief of evidence, 25 September 2006
- s11** Nora Tamehana, brief of evidence, 25 September 2006
- s12** Tui Thompson, brief of evidence, 25 September 2006
- s13** Arnold Durham, brief of evidence, 25 September 2006
- s14** Harai Hohaia McIver, brief of evidence, 25 September 2006
- s15** Mereana Hemana, brief of evidence, 25 September 2006
- s16** Karaki Hoani, brief of evidence, 25 September 2006
- s17** Herapia Riki, brief of evidence, 25 September 2006
- s18** Horace Barney Wiringi Meroiti, brief of evidence, 25 September 2006  
(a) Addendum to document s18, 10 October 2006
- s19** Rangiwhakamara Armstrong, brief of evidence, 25 September 2006
- s20** Grant Thompson and May Smith-Thomas, brief of evidence, 25 September 2006
- s21** Gloria Koia, brief of evidence, 25 September 2006  
(a) He Waiata Tawhito na Turupa mo Kereti – waiata about the Kaimai, 1938
- s22** Amy Sinai McLaughlin, brief of evidence, 25 September 2006
- s23** Lance Hori Waaka, brief of evidence, 25 September 2006
- s24** Draft brief of evidence of Adrian Arthur Kirkland Purdue, 25 September 2006
- s25** Terrence John McEnteer, brief of evidence, 25 September 2006
- s26** Dr Louise Furey, brief of evidence, 25 September 2006
- s27** Toko Renata Te Taniwha, brief of evidence, 25 September 2006
- s28** Shane Ashby, brief of evidence, 25 September 2006
- s29** Ngāti Mōtai and Ngāti Mahana maps (CD), 25 September 2006
- s30** David Taipari, brief of evidence, 25 September 2006
- s31** 'Ngati Motai-Mahana Cluster Working Party', oral history project, 24 September 2006
- s32** Vervies Punohu McCausland, brief of evidence, 27 September 2006
- s33** Maru Tapsell, brief of evidence, 27 September 2006
- s34** William Kapanga Peters, brief of evidence, 27 September 2006
- s35** Whareoteriri Rahiri, brief of evidence, 27 September 2006
- s36** Pauline Clarkin, brief of evidence, 29 September 2006
- s37** Lily-Ann Te Rere Maria Heihei, brief of evidence, 27 September 2006
- s38** Chris Wilson, brief of evidence, 27 September 2006  
(a) Chris Wilson, amended brief of evidence, 27 September 2006
- s39** Hine Thompson-Rauwhero, brief of evidence, 27 September 2006
- s40** Irihia Bidois, brief of evidence, 27 September 2006

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**S40**—*continued*

(a) Irihia Bidois, amended brief of evidence, 27 September 2006

**S41** Matuakore Koperu McMillan, brief of evidence, 27 September 2006

(a) Matuakore Koperu McMillan, amended brief of evidence, 27 September 2006

**S42** Morehu McDonald, brief of evidence, 27 September 2006

(a) Morehu McDonald, amended brief of evidence, 27 September 2006

**S43** Morehu McDonald, second brief of evidence, 27 September 2006

(a) Morehu McDonald, amended second brief of evidence, 27 September 2006

**S44** Morehu McDonald, third brief of evidence, 27 September 2006

(a) Morehu McDonald, amended third brief of evidence, 27 September 2006

**S45** Phillip Samuels, brief of evidence, 27 September 2006

(a) Phillip Samuels, amended brief of evidence, 27 September 2006

**S46** Patrick Nicholas, brief of evidence, 27 September 2006

(a) Patrick Nicholas, amended brief of evidence, 27 September 2006

**S47** Tangiwai Payne, brief of evidence, 27 September 2006

(a) Tangiwai Payne, amended brief of evidence, 20 October 2006

**S48** Tauranga Moana inquiry district map book 1, 2 October 2006

**S49** Ngāti Hinerangi iwi map book, 2 October 2006

**S50** Draft evidence of Te Wiremu Mataia (Nicholls), 27 September 2006

**S51** Tony Walzl, 'Presentation Summary of Ngati Ruahine: Land Issues Overview (1900–2000)', October 2006

**S52** David James Alexander, brief of evidence, September 2006

(a) Supporting documents to document S52, various dates

**S53** Hauraki Maori Trust Board map book (CD), 5 October 2006

**S54** Powerpoint presentation for Waitaha, 9 November 2006

**S55** Dr Caroline Phillips, brief of evidence, undated

**S56** Counsel for Wai 454 and Wai 812, opening submissions, 12 October 2006

**S57** Counsel for Wai 255 and Wai 1340, opening submissions, 9 October 2006

**T. DOCUMENTS RECEIVED TO END OF STAGE 2 FOURTH HEARING**

**T1** Peter McBurney, 'Ngati Motai and Ngati Mahana Cluster of Claims Manawhenua Report' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2006)

(a) Amended version of document T1

(b) Supporting documents to document T1, various dates

**T2** Morehu McDonald, 'Ngati Hinerangi Mana Whenua Report for the Tauranga Moana District' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2006)

(a) Amended version of document T2, October 2006

(b) Summary of document T2, October 2006

(c) Index of supporting documents to document T2

**T3** Paul Malcolm Dell on behalf of the Bay of Plenty Regional Council, brief of evidence, 27 September 2006

**T4** Glenn Snelgrove on behalf of the Western Bay of Plenty District Council, brief of evidence, 29 September 2006

(a) Attachment to document T4

**T5** Stephen Michael Town on behalf of Tauranga City Council, brief of evidence, 2 October 2006

**T6** Barry Somers on behalf of Tauranga City Council, brief of evidence, 27 September 2006



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**T7** Andrew John Ralph on behalf of Tauranga City Council, brief of evidence, 28 September 2006

**T8** David Peterson on behalf of Tauranga City Council, brief of evidence, 29 September 2006

**T9** Buddy Mikaere on behalf of Tauranga City Council, brief of evidence, 25 September 2006

**T10** Anthony Thomas Charles Averill on behalf of Tauranga City Council, brief of evidence, 29 September 2006

**T11** Graeme Linden Jelley on behalf of Tauranga City Council, brief of evidence, 2 October 2006

**T12** Heather Baggott on behalf of the Office of Treaty Settlements, brief of evidence, 2 October 2006

**T13** Terence William Lynch on behalf of the Ministry of Fisheries, brief of evidence, 2 October 2006

**T14** Brodie John Stubbs and James Andrew Cormack McKenzie on behalf of the Ministry for Culture and Heritage, brief of evidence, 6 October 2006

(a) Attachment to document T14, 'Establishing the Ownership and Custody of Newly Found Artifacts under the Antiquities Act 1975', undated

**T15** Taiarahia Taitoko on behalf of the Office of the Māori Trustee, brief of evidence, 12 October 2006

**T16** Michael Belgrave, Grant Young, Adam Heinz, and David Belgrave, 'Tauranga Maori Land Alienation: A Quantitative Overview, 1886–2006' (commissioned research report, Wellington: Waitangi Tribunal, 2006)

(a) Final version of document T16, November 2006

**T17** Brent Parker, brief of evidence, 20 October 2006

**T18** Des Tatana Kahotea, 'A Study of Heritage in Tauranga Moana Since 1991', report prepared for the Crown Forestry Rental Trust, October 2006

(a) Document bank for document T18, various dates

**T19** Peter McBurney, brief of evidence, 24 October 2006

**T20** Affidavit of Gavin Douglas Kemble, 25 October 2006

**T21** Affidavit of Richard Jonathon Turner, 24 October 2006

**T22** Dr Des Tatana Kahotea, brief of evidence, undated

**T23** Antoine Nelson Coffin, brief of evidence, 26 October 2006

**T24** Richard McGovern-Wilson on behalf of the New Zealand Historic Places Trust, brief of evidence, 26 October 2006

**T25** Colin Knaggs on behalf of Transit New Zealand, brief of evidence, 27 October 2006

**T26** Title papers relating to Ngapeke A2A block, various dates

**T27** Warren Gumbley and Ken Phillips, 'Papamoa Lowlands Archaeological Survey and Heritage Assessment', July 2000

**T28** Entry vacated

**T29** Crown counsel, opening submissions, 1 November 2006

**T30** Counsel for local authorities, opening submissions, 2 November 2006

**T31** Entry vacated

**T32** Kenneth John Tremaine on behalf of the local authorities, brief of evidence, 29 September 2006

**T33** Documents in relation to request for information under the Local Government Official Information and Meetings Act 1987

**T34** Ministry of Health report, 'Tatau Kahukura – Maori Health Chart Book', 3 November 2006

**T35** Western Bay of Plenty District Council – Consultation Guidelines, September 2004

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**T36** Michael Belgrave, Anna Deason, and Grant Young, 'Crown Policy with Respect to Maori Land, 1953–1999' commissioned research report, Wellington: Crown Forestry Rental Trust, 2004)  
(a) Summary of document T36

**T37** Ashley Gould, 'Maori Land Development Schemes: Generic Overview, circa 1920–1993' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2004)  
(a) Summary of document T37

**T38** Barry Rigby, 'Establishing the Western Boundary of the Tauranga Moana Inquiry District', undated

**T39** Environment Bay of Plenty, *Tauranga Harbour Integrated Management Strategy* (Whakatane: Environment Bay of Plenty, 2006)

**T40** '1969 City of Tauranga District Scheme, 1969 Tauranga County District Scheme and 1964 Borough of Mt Maunganui Reviewed District Scheme', (hardcopy and CD), 4 December 2006

**U. DOCUMENTS RECEIVED TO END OF  
STAGE 2 FIFTH HEARING**

**U1** Counsel for Wai 362, closing submissions, 24 November 2006

**U2** Counsel for Wai 717, closing submissions, 24 November 2006

**U3** Counsel for Wai 727, closing submissions, 22 November 2006

**U4** Counsel for Wai 755 and Wai 807, closing submissions, 24 November 2006

**U5** Counsel for Wai 664 claimants, draft closing submissions, 24 November 2006  
(a) Counsel for Wai 664, closing submissions, 12 December 2006

**U6** Counsel for Wai 42(c) and Wai 522, closing submissions and generic submissions concerning socio-economic issues, 24 November 2006  
(a) Extract from Mason Durie, *Mauri Ora, The Dynamics of Maori Health* (Victoria, Australia: Oxford University Press, 2001)  
(b) Extract from Mason Durie, *Nga Kahui Pou: Launching Maori Futures* (Wellington: Huia, 2003)

(c) Health Research Council of New Zealand, *The Health Research Strategy to Improve Māori Health and Well-being, 2004–2008* (Auckland: Health Research Council of New Zealand, March 2004)

**U7** Counsel for Wai 342, closing submissions, 24 November 2006

**U8** Counsel for Wai 636 and Wai 1061, closing submissions, 24 November 2006

**U9** Counsel for Wai 715 and Wai 854, closing submissions, 24 November 2006

**U10** Jolene Patuawa, generic closing submissions concerning rating and urbanisation, 24 November 2006

**U11** Counsel for Wai 255 and Wai 1340, closing submissions, 24 November 2006

**U12** Counsel for Wai 211 and Wai 668, closing submissions, undated  
(a) Counsel for Wai 211 and Wai 668, amended closing submissions, undated

**U13** Michael Sharp, generic closing submissions concerning twentieth-century land alienation, development, and administration (issue 2), 24 November 2006

**U14** Counsel for Wai 947, closing submissions, 27 November 2006

**U15** Counsel for Wai 100 and Wai 650, closing submissions, 29 November 2006

**U16** Counsel for Wai 227, closing submissions, undated

**U17** Counsel for Wai 162, closing submissions, 24 November 2006

**U18** Richard Boast, generic closing submissions concerning rivers, harbours, and foreshore and seabed issues at Tauranga, 24 November 2006

**U19** Counsel for Wai 465, closing submissions, undated

**U20** Counsel for Wai 489, closing submissions, 4 December 2006  
(a) Counsel for Wai 489, amended closing submissions, 4 December 2006

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(b)\* Supporting documents to document U20, various dates

U21 Counsel for Wai 1355, closing submissions, 4 December 2006

(a) Avis Tauranga Mt Maunganui road map

U22 Counsel for Wai 1328, closing submissions, 4 December 2006

U23 Counsel for Wai 228 and Wai 266, closing submissions, undated

U24 Counsel for Wai 1226, closing submissions, 5 December 2006

(a) Appendix to document U24: United Nations International Convention on the Elimination of all Forms of Racial Discrimination, 16 May 2006

U25 Generic submissions on public works, 7 December 2006

U26 Crown counsel, closing submissions: introduction and issues 1 and 2, 8 December 2006

(a) Addendum to Crown closing submissions: issues 1 and 2 (summary of Crown closing submissions and response to claimant closing submissions), 15 December 2006

U27 Crown counsel, closing submissions: issue 3, 8 December 2006

U28 Crown counsel, closing submissions: issue 4, 8 December 2006

U29 Crown counsel, closing submissions: issue 5, 8 December 2006

U30 Crown counsel, closing submissions: issue 6, 8 December 2006

(a) Addendum to Crown closing submissions, response to claimant closing submissions, 15 December 2006

U31 Counsel for Wai 540, closing submissions, undated

U32 Counsel for Wai 938, undated

U33 Counsel for Wai 370, closing submissions, undated

U34 Counsel for Wai 210, Wai 637, and Wai 751, closing submissions, 10 December 2006

U35 Counsel for Wai 1178, closing submissions, 10 December 2006

U36 Counsel for Wai 454 and Wai 812, closing submissions, 11 December 2006

U37 Counsel for Wai 42(a), closing submissions, undated

U38 Counsel for Wai 672 and Wai 503, closing submissions, undated

U39 Counsel for local authorities, closing submissions, 12 December 2006

U40 Counsel for Transit New Zealand, closing submissions, 22 December 2006

U41 Crown counsel, closing submissions: land banking, 22 December 2006

U42 Crown counsel, supplementary closing submissions, 12 February 2007



APPENDIX II

**FURTHER TAURANGA MOANA CLAIMS**

**Wai number:** Wai 1422  
**Claimants:** Bryce Wenetia Allen Kihirini  
**Name of claim:** Te Kihirini Wenetia Whānau claim  
**Iwi and hapū**  
**identification:** *A claim on behalf of the descendants of Te Kihirini Wenetia*  
Claimant identifies with Tapuika and Ngāti Moko

**Summary of major issues**

The major issue raised in this claim is the actions of the Crown, and the New Zealand Historic Places Trust as a Crown agent, in granting Transit NZ the right to modify or damage archaeological sites between Te Matai Road and Rangiuru Road, State Highway 2, Waitangi, in the western Bay of Plenty. Claimants allege that these archaeological sites include wāhi tapu and other sites of cultural significance to their whānau, hapū, and iwi, and that they were not consulted on this issue as landowners.

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**Wai number:** Wai 1462  
**Claimants:** Rex Dennis Ainsley  
**Name of claim:** Te Kapaiwaho Ainsley descendants of Mayor Island claim  
**Iwi and hapū**  
**identification:** *A claim on behalf of the whānau of Te Kāpaiwaho Ainsley*  
No iwi or hapū affiliations mentioned

**Summary of major issues**

The major issue raised in this claim is the Crown's actions in relation to the ownership and management of Tūhūa (Mayor Island). The awards of Crown grants and the establishment of a trust board to administer the affairs of the island are alleged to have alienated the original owners

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from ownership of their customary lands, and from guardianship (kaitiakitanga responsibilities) of the island's surrounding waters and other resources.

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**Wai number:** Wai 1703  
**Claimants:** Shane Ashby  
**Name of claim:** Ngāti Pūkenga lands (Ashby) claim  
**Iwi and hapū**  
**identification:** *A claim on behalf of Te Au Māro o Ngāti Pūkenga Charitable Trust, for the benefit of the members of the Ngāti Pūkenga iwi or 'Ngāti Pūkenga Whānui'*  
 Claimant identifies with Ngāti Pūkenga

**Summary of major issues**

There are a number of major issues raised in this claim, all of which relate to the interests of Ngāti Pūkenga in the Bay of Plenty (from Te Puna–Katikati to Maketū) area, as well as in the Coromandel and in Whangarei. The particular matters raised are: landlessness; raupatu, war and confiscation; the operation of the Native Land Court; Crown purchase policy and practice; public works takings; socioeconomic detriment; te reo me ngā tikanga; the environment; rating issues; local government; land development schemes; Māori land boards; and the Māori Trustee.

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**Wai number:** Wai 1774  
**Claimants:** Riri Te Whara Ellis  
**Name of claim:** Otauna block claim  
**Iwi and hapū**  
**identification:** *A claim on behalf of herself*  
 Claimant identifies with Ngāti Tapu hapū of Ngāi Te Rangi

**Summary of major issues**

The major issue raised in this claim is the taking of land, specifically the Otauna block in Tauranga, for public works purposes in the 1970s. The claimant alleges that an excessive amount of land was taken for waterworks for the local council, as well as some for roading (202 acres, when it was argued six acres would suffice). The claimant also alleges that their whānau was given no notice of the taking and was offered no compensation.

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**Wai number:** Wai 1776

**Claimants:** Patricia Joyce

**Name of claim:** Descendants of Cyndric and Wikitoria Joyce claim

**Iwi and hapū identification:** *A claim on behalf of herself and the descendants of Cyndric Joyce and Wikitoria Joyce*

Claimants all identify as descendants of Cyndric Buckland Joyce and Wikitoria Joyce

No iwi or hapū affiliations mentioned

**Summary of major issues**

The major issue raised in this claim is the introduction and operation of the public works regime. The claimants allege that this regime allowed land and resources to be taken for public works without consultation or compensation. Further, the Crown is alleged to have empowered local authorities to take land for public works, and failed to ensure that land surplus to public works requirements was offered back to claimants. In particular, the Crown allegedly acquired a piece of land in around 1957 in Maungatapu, adjacent to Maungatapu School, running from Maungatapu Road to the estuary, for public works purposes. This land was not offered back to claimants once it was no longer required for the purpose for which it was taken. Instead, the land was offered to the education board for use by Maungatapu School.

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**Wai number:** Wai 1785

**Claimants:** Elaine Hiraina Kiwi Potene

**Name of claim:** Te Whānau a Roretana claim

**Iwi and hapū identification:** *A claim on behalf of the Roretana whānau*

Claimant identifies as an uri o Te Whānau o Roretana, of Te Whānau a Tauwhao hapū, of Ngāi Te Rangi

**Summary of major issues**

The major issues raised in this claim are the loss of lands and the loss of customary rights in Katikati and in other areas in the western Bay of Plenty, through Crown action and various Acts of Parliament. One land block in particular is Katikati 2A1, where the claimant alleges that only half an acre is left from an original 11 acres.



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**Wai number:** Wai 1792  
**Claimants:** Te Rereokapuni Traci Te Kawana, Thomas Augustus Wepiha, and Kohakore Hawkes  
**Name of claim:** Wepiha Whānau claim  
**Iwi and hapū identification:** *A claim on behalf of themselves and the Wepiha whānau*  
 Claimant identifies with Ngā Pōtiki hapū of Ngāi Te Rangi

**Summary of major issues**

The major issues raised in this claim are Crown legislation and policy that provided for the confiscation of the whānau's lands and resources; the transformation of customary lands into individualised title; the alienation of lands, including wāhi tapu and sites of significance such as Whaaro Pā; and the mismanagement of the environment (to which local government was delegated significant authority), leading to the loss and depletion of natural resources. The claimants' customary interests lie in the Tauranga region, specifically the Pāpāmoa, Mangatawa, Whaaro, and Pāpāmoa Hills areas.

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**Wai number:** Wai 1793  
**Claimants:** Te Ruruanga Te Keeti  
**Name of claim:** Wairoa and Valley Roads Lands claim  
**Iwi and hapū identification:** *A claim on behalf of himself and others*  
 Claimant identifies with Ngāti Pango and Ngāti Kuku, as well as Ngāti Kāhu and Ngāti Tamahapai

**Summary of major issues**

Two major issues are raised in this claim.

The first is the exercise of Crown powers and functions under the Māori Affairs Act 1953 and the 'Māori Land Development Act', notably the forced sale of the claimant's property at Wairoa Road, Tauranga, lot 2 DP 32944 CT 29C/827 (and another at 14 Valley Road, Te Puke, in the central North Island inquiry district).

The second is the compulsory taking of land for a State highway under the Public Works Act 1928. The address of this road is R350 State Highway 2, North Bethlehem, Tauranga. (land parcel ID 5990/57). The claimants further allege that the Crown has failed to return 'surplus to requirements' lands to the original owners; to relocate boundaries under section 60 of the Māori Affairs Act 1953; to adequately compensate the owners; and to properly advise the Māori owners of their constitutional rights.

## FURTHER TAURANGA MOANA CLAIMS

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**Wai number:** Wai 1931  
**Claimants:** Piripi Dennis Winiata  
**Name of claim:** Ngaitamarawaho claim  
**Iwi and hapū**  
**identification:** *A claim on behalf of Ngāitamarāwaho hapū*  
 Claimant identifies with Ngāitamarāwaho hapū of Ngātiringinui

**Summary of major issues**

The major issues raised in this claim are the transfer of land through the Native Land Court from a principally Ngāi Tamarāwaho mai Ngāti Ranginui ownership system to one that is 'alien to the original indigenous tenure', and the failure of the Native Land Court to take proper account of ahi kā as claimed by the chief Ranginui Te Kaponga. The claim covers the land mass from the 'southern confiscation line boundary between Puwhenua and Otanewaienuku and extending south to the Mangorewa river and Mangorewa gorge/Te Rii o Tamarawaho'.

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**Wai number:** Wai 2042  
**Claimants:** Sam Nikora  
**Name of claim:** Nikora Whānau lands claim  
**Iwi and hapū**  
**identification:** *A claim on behalf of his children and grandchildren*  
 Claimant identifies with Ngāti Maniapoto  
 Claim is made on behalf of the Tauwhao hapū

**Summary of major issues**

The major issue raised in this claim is the confiscation of land and resources in the area between Coromandel and Tauranga. The claim area includes the Waihi Beach area, Anzac Bay reserve, and Tūhua Island, as well as the estuary from Matakana Island to the Bowentown Boating Club. A further issue raised in this claim is the rating of land with multiple owners, which allegedly threatens further land loss due to the cost of rates.

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**Wai number:** Wai 2111  
**Claimants:** Hine Rauwhero, Matuakore Koperu McMillan, and Morehu McDonald  
**Name of claim:** Ngāti Tamapango, Ngāti Tokotoko, and others lands  
 (Rauwhero, McDonald, and McMillan) claim

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**Iwi and hapū**

**identification:** *A claim on behalf of themselves and Ngāti Tamapango and Ngāti Tokotoko as hapū of Ngāti Hinerangi*  
Claimants identify with Ngāti Tamapango and Ngāti Tokotoko hapū, of Ngāti Hinerangi

**Summary of major issues**

The major issues raised in this claim are the loss of lands and undermining of rangatiratanga of Ngāti Hinerangi. All issues relate to the area known as Te Rohe o Koperu, the traditional Ngāti Hinerangi tribal rohe. Particular concerns include the operation of the Native Land Court; excessive land taking for survey liens; Crown purchasing; compulsory acquisition of lands for public works, gravel extraction and scenic reserves; Māori land development schemes; the operation of the Māori Trustee; environmental policy and practice; ratings; failure to protect wāhi tapu and other taonga; Māori education; cultural heritage; health; socioeconomic disadvantage; foreshore and seabed; landlocked blocks; the operation of the Māori land board; failure to facilitate Māori economic growth; and representation – in particular, the non-representation of Ngāti Hinerangi on local government mana whenua forums in Tauranga Moana and Matamata. The claimants further allege that Ngāti Tamapango have wrongfully been included under Ngāti Ranginui, in the Crown's settlement negotiations with that iwi. Rather, they consider themselves a Tainui hapū and, as such, unrepresented (along with Ngāti Hinerangi and Ngāti Tokotoko) in the Crown's current settlement negotiations over Tauranga Moana claim issues.

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**Wai number:** Wai 2113  
**Claimants:** Matuakore Koperu McMillan and Morehu McDonald  
**Name of claim:** Ngāti Tamapango and Ngāti Tokotoko lands  
(Koperu and McDonald) claim

**Iwi and hapū**

**identification:** *A claim on behalf of themselves and Ngāti Tamapango and Ngāti Tokotoko as hapū of Ngāti Hinerangi*  
Claimants identify with Ngāti Tamapango and Ngāti Tokotoko hapū, of Ngāti Hinerangi

**Summary of major issues**

The major issues raised in this claim all relate to the area known as Te Rohe o Koperu, the traditional Ngāti Hinerangi tribal rohe. The particular issues are the allocation of reserve lands in 1886 by the Tauranga land commissioner, Herbert Brabant, which amounted to the individualisation of title to all 'Lands Returned' to Ngāti Tamapango and Ngāti Tokotoko; the loss of

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tribal lands through the operation of the Native Land Court and the subsequent alleged ‘myth about Ngai Te Rangi having sole tribal authority over the lands in Tauranga Moana’; the influx of Pākehā Land speculators and the accompanying pressure on Māori to sell their land; the removal of restrictions on land alienation; gold prospecting in the Kaimai Ranges; and the socio-economic hardship experienced by Ngāti Tamapango and Ngāti Tokotoko due to the confiscation of lands.

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<b>Wai number:</b>	Wai 2114
<b>Claimants:</b>	Hine Rauwhero and Morehu McDonald
<b>Name of claim:</b>	Ngāti Tamapango and Ngāti Hinerangi lands (Rauwhero and McDonald) claim
<b>Iwi and hapū identification:</b>	<i>A claim on behalf of themselves and Ngāti Tamapango and Ngāti Tokotoko as hapū of Ngāti Hinerangi</i> Claimants identify with Ngāti Tamapango and Ngāti Tokotoko hapū, of Ngāti Hinerangi

**Summary of major issues**

The major issues raised in this claim are the alienation of lands in the late nineteenth and twentieth centuries, and the subsequent impact on Ngāti Tamapango and Ngāti Tokotoko. Claimants allege that land loss has led to socio-economic dislocation and poor health, and that the Crown has not encouraged or provided the means to enable development of their remaining lands. The claimants also highlight their close relationship with the Pukehou land block in Wairoa, Tauranga.

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<b>Wai number:</b>	Wai 2223
<b>Claimants:</b>	Jacqueline Haimona, Umuhuri Mateheare, Tracey Nuku, and Te Atarangi Sayers
<b>Name of claim:</b>	Ngā Hapū o Te Moutere o Mōtītī (Sayers and others) claim
<b>Iwi and hapū identification:</b>	<i>A claim on behalf of themselves, and Ngā Hapū o te Moutere o Mōtītī</i>

**Summary of major issues**

The major issue raised in this claim is the administration of Mōtītī Island. It appears to be a contemporary claim. The claimants allege that the Crown, acting through the Minister of Local

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Government and the Department of Internal Affairs, prejudicially affected them by preparing the proposed Mōtītī district plan without adequately consulting with tangata whenua. The claimants allege that this proposed plan fails to take into account Māori values, heritage, or perspectives due to a lack of consultation.

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**Wai number:** Wai 2231  
**Claimants:** Teraaina Ormsby-Teki, Matiu Dickson, and Ngareta Timutimu  
**Name of claim:** Ngāi Te Rangi Māori development (Ormsby-Teki and others) claim  
**Iwi and hapū identification:** *A claim on behalf of Ngāi Te Rangi*  
 Claimant identifies with Ngāi Te Rangi

**Summary of major issues**

The major issue raised in this claim is the loss of te reo Māori through failing to teach te reo Māori in schools; punishing pupils who spoke te reo Māori in schools; and leaving Māori with inadequate resources to allow them to remain on their papakainga and instead forcing them to seek work in Pākehā-dominated locations where te reo is not spoken. Other major issues raised in this claim include the loss of other aspects of Māori culture through the imposition of economic and social systems that forced Māori to assimilate into Pākehā communities.

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**Wai number:** Wai 2252  
**Claimants:** Cheryl Marie Pakuru  
**Name of claim:** Ngāti Te Ngare Lands (Pakuru) claim  
**Iwi and hapū identification:** *A claim on behalf of herself and the hapū of Ngāti Te Ngare*  
 Claimant identifies with Ngāti Te Ngare hapū of Ngāi Te Rangi

**Summary of major issues**

The major issues raised in this claim are the loss of land through Crown action, principally by the operation of the Native Lands Acts and Crown purchasing; alienation from natural resources; loss of customary rights in the claimants' rohe; and the subjection to acts of hostility by Crown forces.

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**Wai number:** Wai 2255

**Claimants:** Peniamina Aiavao, Umuhuri Matehaere, Jacqueline Haimona, Tracy Nuku, and Te Atarangi Sayers

**Name of claim:** Ngā Hapū o te Moutere o Mōtiti (Aiavao and others) claim

**Iwi and hapū identification:** *A claim on behalf of themselves and ngā hapū o te Moutere o Mōtiti, Te Moana a Toi*  
Claimants identify with Te Patuwai

**Summary of major issues**

The major issues raised in this claim are the administration of claimants' ancestral lands (specifically Mōtiti Island) and rights through the administration of Native Lands Act and subsequent legislation, and through orders of the Native Land Court and the successive Māori Land Court, which allegedly led to land loss and loss of tūrangawaewae, mana whenua, and mana tangata. Other issues include Crown failure to provide adequate resources for Mōtiti tangata whenua to develop lands and marine resources; the failure to protect wāhi tapu, puna, wai māori, and sites of significance; and the failure to provide services, infrastructure or facilities to ensure the social and economic viability of the population of Mōtiti Island.

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**Wai number:** Wai 2263

**Claimants:** Phillip Kaikohe Wharekawa

**Name of claim:** Uri o Tarawa and Wharekawa claim

**Iwi and hapū identification:** *A claim on behalf of Wharekawa and Tarawa descents, and Ngāi Te Rangi iwi*  
Claimant identifies with Ngāi Tamawhariua, Ngāi Tuwhiwhia, and Tauiti hapū of Mātaatua waka

**Summary of major issues**

The major issues raised in this claim are the loss of land through public works takings and the taking of land due to outstanding payments of rates, confiscation, and for reserves. The relevant legislation identified in the claim includes the Public Works Act, Ratings Act, Rebellion Act, and the Native Reserves Act. The claimant identifies the following lands as important to his claim: Beach Road, Pukekura Road, and Park Road (all in Katikati), taken under rating legislation; land at Te Rereatukahia, taken for the railway under public works legislation; Waihi urupa at Te Rereatukahia, taken under the Rebellion Act; native reserves belonging to the

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Ngāi Tamawhariua, Ngāi Tuwhiwhia, Ngā Whānau o Tauwhao, and Tauiti hapū, including on Matakana and at Kauri Point (Katikati); Sapphire Springs Hot Pools (Katikati), taken through ‘illegal transfer of title’; the Uretara River and township of Katikati, taken through confiscation; Te Rereatukahia River; lands at Tuapiro Point (Katikati), taken through illegal transfer of title; desecration of wāhi tapu, the landing place of Tainui waka; the native reserves land adjoining the Tahawai Trust orchard (Katikati), taken under the Public Works Act; lands around the township of Waihi Beach, taken through illegal sales of lands; the lands at Whiritoa Waihi, taken under the Ratings Act; and land within the Athenree Forest.

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**Wai number:** Wai 2264  
**Claimants:** The Reverend Kotene Hurae Pihema  
**Name of claim:** Management of the Wairoa River (Pihema) claim  
**Iwi and hapū**  
**identification:** *A claim on behalf of himself and his whānau, and Ngāti Kāhu hapū*  
 Claimant identifies with Ngāti Kāhu hapū

**Summary of major issues**

The major issue raised in this claim concerns the management of the Wairoa River in Tauranga. The claimant alleges that the Crown delegated powers to the Western Bay of Plenty District Council, and in doing so failed to involve Ngāti Kāhu hapū in the management of the Wairoa River. Ngāti Kāhu have lived alongside this river for more than 800 years. The claimants allege that Ngāti Kāhu concerns about the environmental management of this river have not been taken into account by the council’s Wairoa Management Committee.

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**Wai number:** Wai 2265  
**Claimants:** Kipouaka Marsden and Te Awanuiarangi Black  
**Name of claim:** Kaitimako B block (Black and Marsden) claim  
**Iwi and hapū**  
**identification:** *A claim on behalf of themselves and the descendants of the original owners of Kaitimako B block in Tauranga*  
 Claimants identify with Ngāti Pūkenga, Ngāi Te Rangi, and Ngāti Hē

**Summary of major issues**

The major issue raised in this claim is the public works takings involved in the Kaitimako B and C blocks, where claimants allege that more land was taken than was required for the public



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work concerned. The land block owners were allegedly not consulted, therefore it is argued that the Crown failed to provide them with the opportunity to negotiate the amount to be taken. The claimants further allege that they have been prejudicially affected by not being included as claimants to the Kaitimako B block, which was taken under the Public Works Act for power generation, was not used for that purpose, and was not returned to the rightful owners.

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**Wai number:** Wai 2266  
**Claimants:** Riritahi Williams  
**Name of claim:** Mōtiti Island land alienation (Williams) claim  
**Iwi and hapū**  
**identification:** *A claim on behalf of Ngāti Te hapū*  
 Claimant identifies with Ngāti Te hapū

**Summary of major issues**

The major issues raised in this claim are the loss of land on, and loss of ancestral rights to, Mōtiti Island through the operation of the Native Land Court. The impact of individualising land title on Ngāti Te hapū is also raised. Further, the claimants allege that the Crown failed to assist tangata whenua in terms of health and safety, and that the Crown removed the fishing industry from Mōtiti Island without consultation in 1956. More recently, the formulation and implementation of the district hapū management plan is alleged to be contrary to the Treaty of Waitangi.

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**Wai number:** Wai 2289  
**Claimants:** Troy Harmon Kohu  
**Name of claim:** Land alienation and suppression of traditional knowledge (Kohu) claim  
**Iwi and hapū**  
**identification:** *A claim on behalf of himself and his whānau, being descendants of Ngāti Kahungunu and Ngāti Ranginui iwi, and Ngāti Pahauwera and Ngāi Tamarāwaho hapū*  
 Claimant identifies with Ngāti Kahungunu, Ngāti Ranginui, Ngāti Pahauwera, and Ngāi Tamarāwaho

**Summary of major issues**

In terms of the Tauranga inquiry district, the major issues raised in this claim are:

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- ▶ that 22 named Acts have had a negative impact on the claimants' whānau, hapū, and iwi;
- ▶ that the Crown Acts, practices, and policies have resulted in the loss of Ngāti Ranginui lands and resources, and also the suppression of Ngāti Ranginui tribal knowledge, customs, beliefs, and practices;
- ▶ that the Crown has failed to recognise Ngāti Ranginui's tribal authority over its lands and resources, people, and treasures; and
- ▶ that the Crown's actions in prosecuting the war in Tauranga had negative effects on the whānau of Ngāti Ranginui.

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