

WAITANGI TRIBUNAL

WAI 45

CONCERNING the Treaty of Waitangi Act 1975

AND the Muriwhenua Land claim

TO the Minister of Maori Affairs

AND TO the Ministers of Finance, Lands, State Enterprises and Justice

Tena koutou

We write to urge and formally recommend:

- that the Crown take all such steps that it reasonably may to retain or recover for the Crown the land at Kaimaumu in Northland, about to be sold by Landcorp, or that it otherwise seeks to prevent mining or major developments; and
- that measures likewise be taken to prevent the sale of other State Enterprise or Crown surplus land in Muriwhenua during the currency of the Muriwhenua inquiry, without prior consultation with the Muriwhenua Runanga.

These recommendations follow the hearing of an application by the Muriwhenua claimants asking that the Tribunal intervene in the sale of some 1,183 hectares of the Kaimaumu land adjoining Rangaunu harbour.

We are reluctant to intervene, in view of a settlement reached in 1988 between Crown and Maori representatives enabling State Enterprise land to be sold subject to a right of resumption or 'claw-back' whereby Maori might recover the land. We are satisfied however that that scheme did not provide nor was meant to give a complete solution for all situations. In this particular instance there is a serious case to answer arising from the early alienation of the local Maori from their land. There is as a result of that a prima facie claim against Crown and State Enterprise land in the area.

Kaimaumu lies in the area concerned. The block is important as the last of the useable Crown land in the district of the Ngai Takoto hapu of Rangaunu. Most especially however, the sale could lead to land uses inimical to the hapu interests, with developments of an irreversible kind that no subsequent resumption by the Crown could remedy. It is also likely to result in considerable extra taxpayer expenditure should a resumption be effected later. Given the seriousness of the claims made and the possible consequences for claimants the Crown would be acting in bad faith in our view, to forgo any reasonable opportunity to prevent the sale from continuing. The reasons for our recommendations are explained in more detail below.

BACKGROUND TO SALE

Because of some urgency in prosecuting the application, counsel were unable to describe the land or pending sale with customary particularity but we were given to understand:

- (a) that the Kaimaumu land was first advertised for sale by tender on 7 September 1991. There was no prior warning to the claimants or their counsel. Tenders were to close on 25 September;
- (b) that counsel for the claimants wrote to the Ministers of Justice and Maori Affairs seeking the withdrawal of the land from sale on 16 September, before tenders closed, drawing attention to the claim to that land. Further letters were sent on 8 October including one to the Attorney-General. Prior to the current hearing, no substantive reply had been received; and
- (c) that there is now an unconditional agreement for the sale of the land.

It was further submitted that the land:

- (a) contains an environmentally important wetland;
- (b) has potential for peat mining, peat mining licences and a water right having been granted in the early 1980s;
- (c) has further commercial prospects through the zoning of land in the vicinity for a wood-chip barge terminal; and
- (d) is possibly suitable for subdivision or tourist development because of its proximity to an undeveloped white sand beach.

In addition the land might be used for farming. It appears it may have formed part of the former Lands and Survey Kaimaumu Farm Settlement.

The Crown advised also that the land was transferred to Land Corporation Limited (or Landcorp), a state-owned enterprise, pursuant to the State-Owned Enterprises Act 1986, and that although a title may not have issued at this stage, the parties understand that the land is liable to resumption under the Treaty of Waitangi (State Enterprises) Act 1988.

BACKGROUND TO THE STATE ENTERPRISE LEGISLATION

The Waitangi Tribunal formally recommended against the transfer of any Crown land in Muriwhenua during the currency of the Muriwhenua claim, as early as December 1986. This was at a time when the State-Owned Enterprise Bill was before the House. The Tribunal, alerted to the magnitude of the claims, considered the transfers would prejudice the claimants' ability to recover losses should their claims be eventually proven. It was also conjectured that the Bill itself would be contrary to the principles of the Treaty without some scheme that continued the responsibility of the Crown for the return of land, and which restricted alienations by the new corporations in the interim.

The result is well known. Section 9 was added to what became the State-Owned Enterprises Act 1986 providing:

Nothing in this Act shall permit the Crown to act in a manner inconsistent with the principles of the Treaty of Waitangi.

Court proceedings were then instituted on behalf of Maori generally, by the New Zealand Maori Council, to restrain the transfer of lands to the new State Enterprises without some prior arrangement to protect the interests of claimants. The Court of Appeal upheld the council's arguments that land should not be transferred without some such protection, and a general scheme was agreed between the Crown and the council. This scheme was then legislated for in the Treaty of Waitangi (State Enterprises) Act 1988. It provided in brief that on proof of a claim the Tribunal may make binding recommendations for the return of land transferred to a State-owned Enterprise or subsequently on-sold.

CLAIM PROGRESS

The initial Muriwhenua Land inquiry did not proceed much beyond December 1986 because of urgency taken over concurrent legislation for the allocation of fish quotas, and because thereafter the Tribunal became diverted to yet other pressing matters. The land inquiry re-opened however in August 1990. Since then, in addition to receiving claimant evidence, certain independent professional reports under Tribunal commissions have been filed examining the early transactions by which the greater part of the far northern peninsula passed from Maori ownership. It is now hoped that the Tribunal will be able to report its findings on those early transactions by about this time next year.

ISSUES

The claimants brought this application for a recommendation to restrain the Kaimaumu sale on these grounds:

- (a) that specific claims have been made to this land in the course of the inquiry on at least three counts and with considerable supporting evidence;
- (b) that there has been a claim about the land from as early as a Parliamentary petition of 1949;
- (c) that the evidence now adduced is such that the Crown should now restrain the sale of that land;
- (d) that the sale is on behalf of the Crown; and
- (e) that the sale of the land will prejudicially affect the claimants even though the land might later be recovered on a claw-back.

In reply the Crown denies each of those claims and contends:

- (a) though some evidence has been given on the land transactions in the area there has been no previous claim to the Tribunal for the recovery of this specific land;

- (b) the 1949 petition was properly disallowed as the grounds for the petition could not be substantiated;
- (c) the current claim is part heard only and there is insufficient material to justify a prohibition on the sale at this stage;
- (d) the Tribunal lacks jurisdiction since the sale is not by or on behalf of the Crown but an independent State enterprise;
- (e) the resumption provisions offer a sufficient protection to the claimants should their claim be later established; and
- (f) having regard to the resumption clauses in the Treaty of Waitangi (State Enterprises) Act 1988, the sale is not contrary to the Treaty.

We consider Counsel's representations below dealing first with (a), (b) and (c) concurrently.

IS THERE A SUFFICIENT CASE TO ANSWER?

The Crown was right in our view, though we need not conclusively so determine, in challenging the claimants' claim to the land on the basis that it was supposed to be a reserve, as was alleged in the 1949 petition. It appears too that a claim to the land on the basis that an 1839 'purchase' was largely disallowed in a subsequent Crown inquiry is also unsustainable, on the evidence so far given, since in the interim, the area disallowed had been sold to the Crown by Maori, anyway.

The Maori grievance, and search for some land left to them, is symptomatic of a larger problem however. Kaimaumu is in fact central to that part of the far northern peninsula that lies between Te Kao in the north and Kaitaia in the south. From a handful of dealings last century the Maori of that area had been divested of nearly all their land from as early as the mid 1860s. From the reports and inquiries now filed, the causes appear to have been as follows:

- (a) That certain land deeds, resulting in the Old Land Claims of Ford and Southee, were entered into prior to the Treaty of Waitangi for an area of some 22,000 acres. The Maori claimants have challenged the propriety of such transactions, and most especially, relying on professional linguistic and other evidence, have questioned whether sales were intended at all.

We have then concerns about the Crown's examination of the Old Land Claims by the Land Claims Commissioners following the Governor's alleged undertaking, at the time of the Treaty signing, to investigate such claims and return lands unjustly held. In fact the Commissioners granted the purchasers a mere 7,500 acres on the Ford and Southee claims, but kept the surplus of over 14,000 acres to itself. None was returned to Maori.

- (b) The alienation of the greater area however arose from the massive Muriwhenua south and Wharemaru purchases effected by the Crown on 3 February 1858, even before the Old Land Claims had been properly investigated, and before titles were determined. Nearly 100,500 acres passed to the Crown for £1500. This included the Kaimaumu area.

- (c) This left remaining to Maori a sandy peninsula of some 7000 acres adjoining Houhora Harbour. As the last of the Maori land in the area described, one might have expected its reservation. In fact it was not so reserved, but individualised under the Native Land Court system established in 1865 and sold almost immediately after the new court title was awarded.

This threefold pattern, of questionable private purchases as the basis for settler grants and the Crown's ownership of the surplus, of substantial Crown purchases, without any or any adequate reserves, and of large sales following immediately the introduction of the novel Native Land Court title system, applied throughout Muriwhenua. It has been estimated that by the turn of the century, when Muriwhenua Maori comprised 47% of the district population, they owned less than 25% of the land, and less than 5% of that appears to have been developable.

The above precis is based upon preliminary inquiries and reports which, though made largely by professional historical and other researchers on Tribunal commissions, have yet to be supplemented by further evidence, responded to by the Crown or fully examined by the Tribunal itself. To speed final conclusions on those matters the Tribunal will propose to counsel the division of the claim roughly between centuries, so that a final determination and report might be expected next year on the matters arising from the early land transactions. Even at this stage however, we are satisfied that sufficient has come to light in this inquiry so far to indicate a substantial claim, and that on the material so adduced, the most serious questions arise as to the Crown's discharge of its fiduciary Treaty obligations.

In brief, even at this stage, there is a serious case to answer; and though it may be that specific claims have yet to be officially formulated upon the grounds described or made particular to the Kaimaumau land, the evidence already collated compels the negation or deferral of the sale if that is practicable.

Because of the amount of material to substantiate a prima facie case and the considerable loss of land in Muriwhenua generally, we distinguish the Kaimaumau situation from the oral decision given in the course of Waitangi Tribunal proceedings in the Chatham Islands claim declining leave for a full hearing to prevent the sale of Wharekauri farm station. Crown counsel on this claim was only partly correct in contending that the Wharekauri request was declined for want of jurisdiction. It appears that a fresh claim was subsequently formulated in the Chatham Islands, that the sale itself was contrary to the Treaty, but in that case no inquiry had been opened on the substantive claim, and an extensive investigation would have been required. It appears to us that the resumption scheme was designed to cover situations of that kind where an investigation is still pending. There are certain other matters that need prior consideration however.

HAS THE TRIBUNAL JURISDICTION?

There are three questions here though the first was not raised by either counsel. The first, whether the Tribunal can make recommendations before a claim has been

finally heard and proven to be well-founded, can be readily answered in the negative. The question here is not whether the case in the Muriwhenua land transactions has been proven, that is, after completing all inquiries and hearing all interested persons. The question is whether it is contrary to the principles of the Treaty that the Crown should proceed to a sale of land assets when the inquiry has established so far, a serious case to answer on past Crown actions resulting in large resource losses to iwi. The second issue arises from the fact that the Tribunal has jurisdiction only in respect of actions by or on behalf of the Crown. Has the Tribunal jurisdiction then when the sale is effected not by the Crown but through a state enterprise (represented to us by Crown counsel as an independent company)? Though claimant counsel properly questioned the level of independence that the Crown contended for, especially in view of the ministerial shareholding, we need not pursue that matter or the circumstances in which the corporate veil might be lifted. The disposal of Crown, or former Crown assets is an important Crown policy, and the claim must be admitted as against that policy, or against any deficiency in the policy design. It matters not in our view whether the particular instrument created by the Crown to achieve its goal is or is not a Crown agency. It is sufficient that the sale of the Kaimaumau land is pursuant to a Crown policy for asset disposal. The question concerns the propriety of that policy when applied to the particular case, and whether something should be done to amend that policy in this instance, or to retrieve the situation.

There is a third matter of jurisdiction. Can the Tribunal recommend against a particular land sale in view of the 1988 settlement providing for a resumption in appropriate cases?

We are of opinion that the resumption scheme represented in the Treaty of Waitangi (State Enterprises) Act 1988 does not provide a complete discharge of the Crown's Treaty obligations, nor does it cover all situations. This might be assumed from the manner in which the settlement itself was effected, and in particular the enactment of the resumption clauses in the 1988 Act without relieving the Crown from the general provision in section 9 to act consistently with the Treaty in the disposal of land assets. There is further support for the view that the scheme is not comprehensive, from previous cases. The Court of Appeal saw the need for a further protective arrangement on the sale of surplus Crown land in *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (Coal Sales). Richardson J questioned the efficacy of buy-back arrangements in *Runanga o Muriwhenua v Attorney-General (No 2) (Fish Quota Sales)* CA110/90, 28.6.90, though there with reference to fishing ITQ. The Waitangi Tribunal on the Ngai Tahu claim urged that surplus Crown land be not sold in the South Island pending its final report and recommendations resulting in an early-warning system being introduced (*Ngai Tahu Report* (1991) 4 WTR 693). In *NZ Maori Council v Attorney-General (Airwaves Sale)* Wellington CP942/88, 3.5.91, McGechan J considered specifically that the State enterprise claw-back scheme in particular 'does not foreclose other protective approaches where warranted'. Finally the Government itself has entertained alternative schemes for the alienation of Crown assets, first by a reservation of land and capital in the Crown Forest Assets Act 1989 and secondly by a consultative process in a settlement with the National Maori

Congress of October 1991. While only the comments of McGechan J refer specifically to the State Enterprise claw-back scheme, each case illustrates the need for alternative arrangements to accommodate the claim resolution process within the Crown's assets sale programme as new situations present themselves.

In the particular case of land sales through state enterprises, a distinction must be made between claims awaiting hearing with which the 1988 action and settlement was concerned, and those substantially heard and researched. There must come a point at which the Crown should ask whether it is sufficient or appropriate to rely upon the claw-back provisions or whether, having regard to the state of any inquiry, it would be proper to proceed at all. In all fairness the Crown should consider not only the Maori party, but would-be purchasers whose own plans may thus be set aside, and also the general tax-paying public, since the compensation paid to purchasers will likely exceed the price they originally paid.

Accordingly in our view the 1988 settlement serves to justify alienations in many, perhaps most cases where claims have yet to be heard, but not in all cases, and most especially, not in those situations where a prima facie case is apparent. We think it incumbent on the Crown not to rely upon the letter of the 1988 settlement, but to consider constantly the propriety of decisions having regard to its overall obligations, recognised in the Court of Appeal, to seek the fair and just settlement of valid claims. In the present situation it would have been a reasonable requirement had the Crown directed the state enterprise to inquire of the claim progress or consult with the Muriwhenua claimants before promoting a sale, either by direct instruction, if that be permitted, or by amendment to the statement of corporate intent.

ARE THE CLAIMANTS PREJUDICIALLY AFFECTED?

Are the claimants prejudiced however, or likely to be prejudiced, in this particular case? Counsel for the claimants contended that prejudice arises in various ways, and citing Richardson J in *Te Runanga o Muriwhenua v Attorney-General (No 2)* (supra) he referred initially to the general community opprobrium and disharmony that may follow the recovery of Crown assets that have passed to private ownership. Counsel for the Crown contended that claw-back gave a complete remedy and refuted any suggestions that the Tribunal might resile from proposing a resumption on account of public hostility. The buyer has notice of the claw-back liability, she pointed out, the benefit of any price reduction because of it and the right to compensation at full value if a resumption is in fact effected. The Tribunal is also directed by the Act to disregard any changes in the ownership or condition of the land when considering resumption issues. While we agree the Tribunal would not and should not retreat from recommending any necessary resumption, for the reasons given, such matters would count for little in the general public debate should claimants seek to reclaim land from private ownership. The pressure is on claimants not the Tribunal. Despite some opinions to the contrary, it is our general observation that Maori claimants have no wish to be seen in a hostile role within the society of which they form part.

We observe then that the ‘public relation’ caution is a criticism applying to the scheme as a whole, a scheme nonetheless agreed to by the Maori Council. That does not invalidate the scheme however, but it does serve to remind parties that it is at best a compromise. Counsel for the claimants was therefore right to emphasise other areas of prejudice more specific to the case. No attempt was made or perhaps could be made by the Crown to explain the purchasers’ intended land usage, but in the absence of any Crown imposed usage restrictions, we agree that the natural attributes of the land render likely its use for mining, or for capital intensive resort development. Either alternative would foreclose on future use options by Maori, should the land be resumed. Mining in particular may be opposed by Maori, because of the value of the wetland, or if not so opposed, would result in an irrecoverable resource depletion. In these circumstances we consider, there is the likelihood of a substantial prejudice that resumption would not remedy.

IS THE SALE CONTRARY TO THE TREATY?

It is inconsistent with the principles of the Treaty that the Crown should implement a sweeping series of land transfers without adequate protection for actual or foreseeable Maori claims. That was the thrust of the Court of Appeal decision in *NZ Maori Council v Attorney-General* [1987] 1 NZLR 641. Thus as we see it, the promise to protect Maori in the ownership of their land in 1840, becomes in our own time a duty to recompense any wrongful deprivation and not to so alienate remaining Crown assets as to overly complicate redress.

It follows in our view that it is also inconsistent with the Treaty for the Crown to permit the disposal of land, even subject to resumption, either because a prima facie case for its recovery is apparent or claw-back may not be a sufficient remedy because of the likelihood of some deleterious interim user.

PROPOSALS

For all these reasons we urge that all reasonable steps be taken to retain the Kaimaumu land with Landcorp, to recover it for the Crown or otherwise to limit its user pending the completion of the current inquiries. Crown counsel has contended that nothing can be done now, because of the unconditional contract and the Crown’s limited facility to intervene. We are not put on inquiry into those matters. We need only determine that for consistency with the Treaty (and thus with the law in section 9 of the State Owned Enterprises Act 1986), the Crown should take all such steps that it can for the land’s preservation. This might include as a last resort, the negotiation of interim measures to prevent mining or major developments.

It also seemed important in our view that parties should be advised of the prospect of resumption having regard to the current state of the inquiry. We observe in this context, that the Tribunal gave prior warning against land sales in this area as early as

1986. To the best of our knowledge no inquiry was made by Landcorp as to the subsequent claim progress. We now invite the Crown to consider provision for inquiries to be made where claims are under current hearings, in the statement of corporate intent or other policy documents of the state enterprises generally.

We also propose a consultation scheme for the disposal of future State enterprise or Crown surplus land in the Muriwhenua district upon the grounds that current evidence and research indicates a serious case to answer in respect of the area as a whole. Consultation seems necessary, in such circumstances. Provided both Maori and Crown are prepared to act reasonably it may well result in land disposals freed of any resumption provision as a burden on the purchasers' titles, and freed of the prospect that purchasers may use lands in short term or unduly exploitative ways because of the resumption prospect.

Dated at Wellington this 30th day of October 1991

Edward Taihakurei Durie, chairperson

Dr Evelyn Mary Stokes, member

Joanne Robin Morris, member

Per: [Signed E T J Durie]